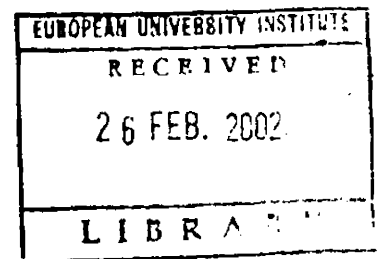




*European University Institute*  
Department of Law



## **SOFTLY, SOFTLY**

**DEVELOPING A NORMATIVE FRAMEWORK FOR INTERNALLY DISPLACED PERSONS  
AND ITS IMPLICATIONS FOR THE HUMAN RIGHTS LAW-MAKING PROCESS**

**Simon Bagshaw**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

Florence  
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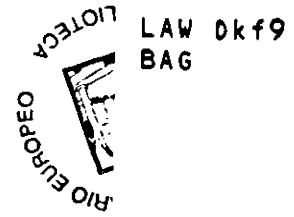






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Geneva, 14 February 2002



## ABBREVIATIONS

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ACHPR – African Charter on Human and Peoples' Rights  
ACHR – American Convention on Human Rights  
AEL – *Proceedings of the Academy of European Law*  
AJIL – *American Journal of International Law*  
*American Uni. J. Int'l. L. and Policy* – *American University Journal of International Law and Policy*  
ASEAN – Association of South East Asian Nations  
ASIL – American Society of International Law  
ASIL Proc. – *Proceedings of the American Society of International Law*  
*Australian J. Human Rights* – *Australian Journal of Human Rights*  
*Australian YB Int'l. L.* – *Australian Yearbook of International Law*  
BYBIL – *British Yearbook of International Law*  
C.L.J – *Cambridge Law Journal*  
CAT – Committee Against Torture  
CEDAW – Committee for the Elimination of Discrimination Against Women  
CERD – Committee for the Elimination of Racial Discrimination  
CESCR – Committee on Economic, Social and Cultural Rights  
CHR – Commission on Human Rights  
CIREFCA – International Conference on Central American Refugees  
*Cornell Int'l. L. J.* – *Cornell International Law Journal*  
CRC – Committee on the Rights of the Child  
CYBIL – *Canadian Yearbook of International Law*  
DHA – Department of Humanitarian Affairs  
ECHR – European Convention on Human Rights  
ECOSOC – Economic and Social Council  
ECOWAS – Economic Community of West African States  
ELR – *European Law Review*  
EPIL – *Encyclopaedia of Public International Law*  
ERC – Emergency Relief Coordinator  
EU – European Union  
*European HR. L. Rev.* – *European Human Rights Law Review*  
ExCom – Executive Committee of UNHCR  
*Fordham L. Rev.* – *Fordham Law Review*  
G77 – Group of 77  
GA – General Assembly  
*Georgia J. Int'l. & Comp. L.* – *Georgia Journal of International and Comparative Law*  
GFA – General Framework Agreement for Peace in Bosnia and Herzegovina  
*Harv. HR. L. J.* – *Harvard Human Rights Law Journal*  
*Harv. L. Rev.* – *Harvard Law Review*  
*Harvard Int'l L. J.* – *Harvard International Law Journal*  
*Hastings Int'l & Comp. L. Rev.* – *Hastings International and Comparative Law Review*  
HRC – Human Rights Committee  
HRLJ – *Human Rights Law Journal*  
HRQ – *Human Rights Quarterly*  
IASC – Inter-Agency Standing Committee  
ICCPR – International Covenant on Civil and Political Rights  
ICESCR – International Covenant on Economic, Social and Cultural Rights  
*ICLQ* – *International and Comparative Law Quarterly*  
ICJ – International Court of Justice

ICRC – International Committee of the Red Cross  
 ICVA – International Council of Voluntary Agencies  
 IFRC – International Federation of the Red Cross and Red Crescent Societies  
 IHRLG – International Human Rights Law Group  
*IJRL – International Journal of Refugee Law*  
 ILC – International Law Commission  
*ILJ – Industrial Law Journal*  
*ILM – International Legal Materials*  
 ILO – International Labour Organisation  
 Int'l Migration Rev. – International Migration Review  
*Int'l. Migration – International Migration*  
 IOM – International Organisation for Migration  
*Israeli YHR – Israeli Yearbook of Human Rights*  
*J. Int'l. Affairs – Journal of International Affairs*  
*JRS – Journal of Refugee Studies*  
*Leiden J. of Int'l L. – Leiden Journal of International Law*  
*Mich. J. Int'l. L. – Michigan Journal of International Law*  
 MINARS – Ministry of Social Assistance and Reintegration  
*MLR – Modern Law Review*  
 NRHIs – National Human Rights Institutions  
 NGO – Non-Governmental Organisation  
*Nordic J. Int'l. L. – Nordic Journal of International Law*  
*NQHR – Netherlands Quarterly of Human Rights*  
 NRC – Norwegian Refugee Council  
*NYU J. Int'l. L. & Pol – New York University Journal of International Law and Politics*  
 OAS – Organisation of American States  
 OAU – Organisation of African Unity  
 OCHA – Office for the Coordination of Humanitarian Affairs  
 ODIHR – Office for Democratic Institutions and Human Rights  
 OHCHR – Office of the High Commissioner for Human Rights  
 OSCE – Organisation for Security and Cooperation in Europe  
 RC/HC – Resident/Humanitarian Coordinator  
 RdC – Collected Courses of the Hague Academy  
 res. – resolution  
 RPG – Refugee Policy Group  
 SARRED – International Conference on the Plight of Refugees and Displaced Persons in Southern Africa  
 SC – Security Council  
 Sub-Comm'n – Sub-Commission for the Promotion and Protection of Human Rights  
*Sup. Ct. Rev. – Supreme Court Review*  
*Texas Int'l. L. J. – Texas International Law Journal*  
 UDHR – Universal Declaration of Human Rights  
 UNDP – United Nations Development Programme  
 UNHCR – United Nations High Commissioner for Refugees  
 UNESCO – United Nations Educational, Scientific and Cultural Organisation  
 UNICEF – United Nations Children's Fund  
*Virginia J. Int'l. L. – Virginia Journal of International Law*  
 WCC – World Council of Churches  
 WHO – World Health Organisation  
 WFP – World Food Programme  
*Yale J. Int'l L. – Yale Journal of International Law*  
 YEL – Yearbook of European Law



## INTRODUCTION

'The treaty is dead! Long live the legally non-binding agreement!' A rather extreme and not entirely accurate assessment of the current state of human rights law-making but indicative all the same of an emerging trend in human rights law-making; a trend characterised by a move away from traditional state-centred law-making processes such as treaty-making to less state-centric, more inclusive, innovative and nuanced processes. A trend which this thesis seeks to examine by reference to the efforts in recent years to develop a normative framework for the protection and assistance of internally displaced persons – a conventional human rights issue, addressed in a rather unconventional manner.

Although treaties or 'international conventions' are one of the four sources of international law referred to in the Statute of the International Court of Justice,<sup>1</sup> they

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<sup>1</sup> According to Article 38(1), the traditional point of departure for the identification of the sources of international law, '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognised by civilised nations;
- d. subject to the provisions of Article 59 [stating that decisions of the Court have no binding force except between the parties to the case], judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties of 1969 defines treaties as international agreements concluded between States in written form and governed by international law. Pursuant to the maxim *pacta sunt servanda* and Article 26 of the Vienna Convention, according to which '[e]very treaty in force is binding on the parties to it and must be performed by them in good faith', treaties give rise to binding obligations for those States which expressly consent to be bound by the terms of a specific treaty. This is what Jennings and Watts describe as the 'general importance of treaties' – the fact that 'the rules established by them, and the rights and obligations to which they give rise, are legally binding on the parties to the treaty ... It is this aspect of treaties which is foremost in Article 38(1)(a) of the Statute of the International Court of Justice which refers to "international conventions, whether general or particular, establishing *rules expressly recognised* by the contesting States"'. In the case of United Nations human rights, the consent of the State must be expressed either by ratification or accession.

Although ratification and accession are both defined in Article 2 (1)(b) of the Vienna Convention as the 'international act so named whereby a state establishes on the international plane its consent to be bound by a treaty', the latter term applies specifically to states which took no part in the drafting or adoption of the treaty to which they subsequently seek to become a party. On the basis that 'some international awareness of the fact of ratification [or accession] is needed in order to establish the state's consent to be bound by the treaty' instruments of ratification or accession must, in the case of United Nations human rights treaties, be deposited with the Secretary-General. Human rights treaties are open for ratification or accession either by all States or by all Member States of the United Nations, in

have since the Second World War come to constitute its principal source. As Oscar Schachter observes, since 1945, the expansion of international law in volume, density and scope of subject matter 'has been most evident in the proliferation of treaties.'<sup>2</sup> Indeed, at the time of the founding of the League of Nations there were only a small number of significant multilateral treaties, a number which increased only marginally during the inter-war period. However, with the establishment of the United Nations and the various organisations that became its specialised agencies, the 'real bloom' in multilateral treaty-making began.<sup>3</sup>

For Henry Steiner and Philip Alston, treaties have become the principal expression of international law and, particularly when multilateral, 'the most effective if not the only path toward international regulation of many contemporary problems',<sup>4</sup> not least among them the protection of human rights: 'Only treaties, not custom or general principles, can create international institutions in which State Parties participate and to which they owe duties.'<sup>5</sup> The treaty constitutes 'one of the most effective means for bringing some order to relationships among States or their nationals, and for the systematic development of new principles responsive to the changing needs of the international community.'<sup>6</sup> It is the 'prime legal form through which [the international community] can realise some degree of stability and predictability, and seek to institutionalise ideals like peaceful settlement of disputes and protection of human rights'.<sup>7</sup>

Since 1945, the United Nations has adopted over thirty multilateral treaties in the field of human rights addressing a broad and diverse range of areas. Of these, the

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which case provision is usually made for ratification or accession by non-Member States upon the invitation of the General Assembly. See for example, Art.48 of the International Covenant on Civil and Political Rights. See further, R. Jennings and A. Watts, *Oppenheim's International Law* (1992) 1197ff; I. Brownlie, *Principles of Public International Law* (1998) 11-14.

<sup>2</sup> O. Schachter, *International Law in Theory and Practice* (1993) 74.

<sup>3</sup> Szasz, 'General Law-Making Process', in O. Schachter and C. Joyner, *United Nations Legal Order*, Vol. 1 (1995) 40

<sup>4</sup> H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (1996) 30.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, at 32.

<sup>7</sup> *Ibid.*, at 32. In a similar vein, Virginia Leary refers to treaties as having fast become the principal tool at the disposal of the international community for obliging States to 'improve the lot of their residents and to guarantee individual rights'. And as Martin, Schnably *et al* observe, international human rights law 'is first and foremost, a law of treaties'. See V. Leary, *International Labour Conventions and National Law* (1982) 1; and F.F. Martin, S.J. Schnably *et al* (eds), *International Human Rights Law and Practice: Cases, Treaties and Materials* (1997) 27.

following are often referred to as the six 'core' United Nations human rights treaties:<sup>8</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>9</sup> the International Covenant on Civil and Political Rights<sup>10</sup> and its two optional protocols,<sup>11</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>12</sup> the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>13</sup> the Convention on the Rights of the Child<sup>14</sup> and its two optional protocols,<sup>15</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>16</sup>

The scope and quantity of United Nations human rights treaty-making is certainly impressive. Indeed, the extent of human rights law-making in the United Nations has been described as constituting 'one of the United Nations greatest and potentially most enduring, achievements'.<sup>17</sup> Others have stated that 'in perhaps no other area has the United Nations been so prolific, or some would argue, so successful as it has been in the adoption of new international norms for the protection of human rights'.<sup>18</sup> What is less certain, however, is the extent to which one can maintain the view that treaties and treaty-making are – as Steiner and Alston assert – the most effective if not the only path toward international regulation of contemporary problems such as the protection of human rights.

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<sup>8</sup> 'Core' in the sense that they provide for a system of international monitoring of their implementation as discussed further in chapter two.

<sup>9</sup> Adopted by GA res. 2200 A (XXI) (1966). In United Nations, *A Compilation of International Instruments*, Vol. 1, First Part (1994) 8 (hereinafter *International Instruments*).

<sup>10</sup> Adopted by GA res. 2200 A (XXI) (1966). In *International Instruments*, *ibid.*, at 20.

<sup>11</sup> Optional Protocol to the International Covenant on Civil and Political Rights. Adopted by GA res. 2200 A (XXI) (1966). In *International Instruments*, *ibid.*, 41; and Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by GA res. 44/128 (1989). *Ibid.*, at 46.

<sup>12</sup> Adopted and opened for signature and ratification by GA res. 2106 A (XX) (1965). In *International Instruments*, *ibid.*, at 66.

<sup>13</sup> Adopted and opened for signature, ratification and accession by GA res. 34/180 (1979). In *International Instruments*, *ibid.*, at 150.

<sup>14</sup> Adopted and opened for signature, ratification and accession by GA res. 44/25 (1989). In *International Instruments*, *ibid.*, at 174.

<sup>15</sup> Optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, draft resolution A/54/L.84, adopted by the General Assembly at its 97<sup>th</sup> plenary meeting.

<sup>16</sup> Adopted and opened for signature, ratification and accession by GA res. 39/46 (1984). In *International Instruments*, *ibid.*, at 293.

<sup>17</sup> *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights. Note by the Secretary-General.* A/44/668 (1989), para. 146.

<sup>18</sup> Hannum, 'Human Rights', in C. Joyner (ed), *The United Nations and International Law* (1997) 131.

## 1. Implementation Versus Elaboration

In the first place, there has for several years now been an emphasis on the implementation of existing standards in preference to the elaboration of new ones. Writing in 1982 on the problems and dangers of normative conflict between human rights instruments, Theodor Meron suggested that such problems were less likely in the future, given that the international community 'may have passed the zenith of its legislative activity in the area of human rights, at least in so far as broadly oriented global instruments are concerned'.<sup>19</sup> In its resolution 41/120 of 1986, the General Assembly called upon Member States and United Nations bodies 'to accord priority to the implementation of existing international standards in the field of human rights' and urged 'broad ratification of, or accession to, existing treaties in this field'. The following year, the United Nations Secretary-General urged that the main focus of human rights activities should be 'on bringing universal respect in fact for what has been agreed in principle'.<sup>20</sup> In 1988, some went so far as to suggest that a moratorium be imposed on any further standard-setting.<sup>21</sup>

At less of an extreme, Theo van Boven noted in 1989 that in view of the adoption of the International Bill of Human Rights<sup>22</sup> and other international instruments, as well as the ongoing development of the normative content of international human rights law by the human rights treaty bodies, 'there are strong grounds for arguing that priority should be accorded to the implementation of existing standards in the field of human rights rather than to elaborating new standards'.<sup>23</sup> Ten years later, the Bureau of the Commission on Human Rights remarked that the human rights standard-setting activities of the United Nations 'have entered a relatively advanced, mature stage, with emphasis increasingly being placed on implementation-oriented activities'.<sup>24</sup>

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<sup>19</sup> Meron, 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order', 76 *AJIL* (1982) 771.

<sup>20</sup> Quoted in A/44/668, para.151.

<sup>21</sup> 'Consolidation of Human Rights Machinery', E/CN.4/1988/NGO/36 (1988).

<sup>22</sup> That is to say the Universal Declaration of Human Rights, adopted and proclaimed by GA res. 217 A (III) (1948), and the two International Covenants.

<sup>23</sup> van Boven, 'The Future Codification of Human Rights: Status of Deliberations - A Critical Analysis', 10 *HRLJ* (1989) 3.

<sup>24</sup> *Report of the Bureau of the fifty-fourth session of the Commission on Human Rights submitted pursuant to Commission decision 1998/112*. E/CN.4/1999/104 (1998), para. 58. See also Higgins, 'International Law in a Changing International System', 58 *C.L.J.* (1999) 83, according to whom the 'current emphasis' in human rights is on implementation and that 'law-making is probably largely behind us'.

Arguments in support of increased emphasis on implementation over standard-setting are contained in Alston's 1989 report to the General Assembly on the effective implementation of international instruments on human rights. For example, Alston notes that it has been suggested that new standard-setting exercises might sometimes be encouraged for the express purpose of diluting or undermining existing standards, or in order to distract attention and resources away from other important activities such as implementation.<sup>25</sup> Given the expensive and time consuming nature of standard-setting, Alston states that some have implied that standard-setting might be part of a zero-sum game in terms of the allocation of available resources, noting that in response to a proposal for a new draft convention, one state suggested that the result would be to 'divert scarce United Nations and Member State resources from other pressing human rights matters'. Thus, if the United Nations devotes a given amount of resources to standard-setting, the resources available both to the Organisation itself and to the Member States for other aspects of human rights promotion and protection will be reduced proportionately. Given the relatively small percentage of the United Nations budget devoted to human rights, the limited number of secretariat officials with the technical and legal expertise required for standard-setting, the constantly growing demands on the limited meeting time available to the various organs and the immense pressures for restraint generated by the Organisation's financial crisis, Alston considers that 'there are strong arguments supporting the zero-sum game assumption'.<sup>26</sup>

It is along these lines that Geraldine Van Bueren dismissed the drafting of the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Noting that States do not always fulfil their international obligations, Van Bueren argued that sometimes 'a disproportionate amount of energy is expended in seeking to raise standards, leaving less resources for their implementation'.<sup>27</sup> The author referred to a proposal from within the Committee on the Rights of the Child for the creation of an 'urgent responses' procedure which would allow the Committee to intercede with States in the event of serious and urgent situations entailing a risk of further violations of the Convention, a procedure she regards as 'particularly suited to armed conflicts' and considered as part of the

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<sup>25</sup> A/44/668, para.149.

<sup>26</sup> Ibid.

dialogue between the State Party and the Committee.<sup>28</sup> For Van Bueren, '[i]t is this type of constructive approach, working within the boundaries of the treaty, which needs to be explored more fully before seeking to raise minimum ages, which even at their present levels are not always honoured'.<sup>29</sup>

The Committee on the Rights of the Child reacted in a similar fashion to the establishment in 1994 of an open-ended working group of the Commission on Human Rights to prepare guidelines for the draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.<sup>30</sup> During its sixth session in April 1994, the Committee stressed the important framework established by the Convention to deal with such issues<sup>31</sup> and its 'firm belief' that 'priority should now lie with the strengthening of the implementation of existing international standards'.<sup>32</sup> The report of the working group on its first session reveals similar sentiments on the part of some of its members who felt the Convention already provided the necessary legal framework and that urgent action was needed above all to implement the relevant provisions. As the report put it: 'Concern was expressed that in the present time of scarce resources, the elaboration of another international instrument might drain resources from existing efforts, ultimately with negative results.'<sup>33</sup>

## **2. The Continuing Need for New and Advanced Human Rights Standards**

As will be shown, increased emphasis on the effective implementation of existing instruments is both necessary and welcome. That said, it is important to recognise also that there will always be a need to adapt standards to changing circumstances and to draft new standards in response to new challenges. As Nicolas Valticos has observed in regard to the need for further standard-setting by the International Labour Organisation (ILO), but clearly of broader application:

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<sup>27</sup> Van Bueren, 'International Legal Protection of Children in Armed Conflict', 43 *ICLQ* (1994) 825.

<sup>28</sup> *Ibid.* See the report of the Committee, CRC/C/SR.42.

<sup>29</sup> Van Bueren, note 27 above, at 825.

<sup>30</sup> CHR res. 1994/90.

<sup>31</sup> See *Report on the sixth (special) session*. CRC/C/29 (1994).

<sup>32</sup> See the report of the working group in E/CN.4/1994/WG.14/2/Add.1. Quoted in R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* (1998) 467. The Committee reiterated this view in a subsequent statement to the Working Group in 1996. See *Report on the eleventh session*. CRC/C/50 (1996).

<sup>33</sup> *Question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as basic measures needed*

It is true that the existing standards already cover a wide range of labour problems and even human rights but it would be an illusion to imagine that the body of standards could ever be complete, whether on the international or the national plane. In either case there can be no exhaustive or immutable code, especially in an area of rapid change: needs and concepts alter with the years and old instruments must be added to or overhauled to adapt them to new requirements.<sup>34</sup>

Similarly, van Boven notes that various reasons can be adduced for further standard-setting in human rights, not least of all that 'existing human rights law leaves obvious gaps and does not fully meet the rights and interests of vulnerable persons or groups of persons'<sup>35</sup> which, importantly, may change over time as a result of the emergence of new social, technological, economic and political realities.<sup>36</sup> Indeed, developments in recent years in the area of biotechnology, for example, have led to calls for an international convention against the reproductive cloning of human beings on account of the possible dangers posed to the integrity and dignity of the individual.<sup>37</sup>

The continuing need for new or more advanced human rights standards has become apparent also in the context of the humanitarian crises of the post-Cold War

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*for their prevention and eradication. Report of the working group. E/CN.4/1995/95 (1995), paras.16-18.*

<sup>34</sup> N. Valticos, 'The Future Prospects for International Labour Standards', 118 *Int'l Lab. Rev.* (1979) 680. Similar sentiments, 18 years on, are noted in *The ILO, Standard-Setting and Globalisation: Report of the Director-General*, International Labour Conference, 85th Session, 1997 (1997), in particular at 35ff. In addition to observing that the international community may have reached the peak of its legislative activity in regard to broadly oriented global instruments, Meron states that 'new subjects suitable for legislation will no doubt come up' [note 19 above, at 772]. GA res. 41/120 recognises 'the value of continuing efforts to identify specific areas where further international action is required to develop the existing international legal framework in the field of human rights'. The Secretary-General's plea for universal respect for existing standards acknowledged the possibility that 'changes in the global habitat' and 'new areas of human endeavour' might give rise to the need for more standards. In the Third Committee of the General Assembly, one of the responses to the Secretary-General's suggestion was to emphasise that 'much still needed to be done, for instance, on the right to development, the right to adequate housing, human rights and mass exoduses, human rights in the administration of justice, migrant workers and their families, the enhancement of social life, and the strengthening of international cooperation in the field of human rights'. [A/C.3/42/SR.40, para.33, quoted in A/44/668, para.151]. Also, the report of the Bureau recognises that there is a 'constant emergence of new issues requiring international attention'. [E/CN.4/1999/104, para.58].

<sup>35</sup> van Boven, note 23 above, at 3.

<sup>36</sup> *Ibid.*, at 4.

<sup>37</sup> See further, *Letter dated 7 August 2001 from the Chargés d'affaires a.i. of the Permanent Missions of France and Germany to the United Nations addressed to the Secretary-General. A/56/192 (2001)*. See also CHR res.2001/71.

era and beyond. Contrary to the hopes and aspirations of many, the bi-polar world of Cold War confrontation has not been replaced by a 'new world order' where 'diverse nations are drawn together in common cause, to achieve the universal aspirations of mankind: peace, security, freedom and the rule of law'<sup>38</sup> – a world characterised by liberal democracy, the free market and international cooperation. True, authoritarian regimes have given way to democratic alternatives in a number of regions; a Big Mac can now be bought in all corners of the world; and the cooperation of the Soviet Union in the Security Council allowed the 'community of nations' to respond decisively to Iraq's invasion of Kuwait in 1991. Moreover, in the absence of Superpower rivalry, several long-standing conflicts in places such as Namibia, Nicaragua, El Salvador, Cambodia and Mozambique have wound down.

On the downside, however, Cold War confrontation has in many places been replaced by post-Cold War disintegration - disintegration of States, of peace and stability, and of human lives. The previous and present decades have borne witness to a broad range of humanitarian crises affecting all regions of the globe, stemming for the most part from armed conflict, generalised violence and associated violations of human rights.<sup>39</sup> While armed conflict is hardly a new phenomenon on the international scene, the nature of contemporary conflict is qualitatively different to that of the past. Firstly, the overwhelming majority of contemporary armed conflicts are fought within rather than between States. Of the 27 major conflicts being fought at the beginning of the present century, all but two were internal conflicts.<sup>40</sup> Secondly, the tactics used in contemporary armed conflict frequently rely upon the deliberate brutalisation of civilian populations on a quite extreme scale.<sup>41</sup> Such

<sup>38</sup> US President George Bush, 'State of the Union Address', 29 January 1991. Reproduced in *Keesings Record of World Events: News Digest for January 1991*, at 37940.

<sup>39</sup> As the United Nations Secretary-General, Kofi Annan remarked in 1997: 'The lives of millions of people around the globe continue to be blighted by violence. In some parts of the world, state have collapsed as a result of internal and communal conflicts, depriving their citizens of any effective protection. Elsewhere, human security has been jeopardised by governments which refuse to act in the common interest, which persecute their opponents and punish innocent members of minority groups... [S]uch conditions have made it impossible for those millions of people to exercise a basic human right: to live safely, peacefully and without fear in their own homes.' In UNHCR, *The State of the World's Refugees 1997-1998: A Humanitarian Agenda* (1997) ix.

<sup>40</sup> See SIPRI, *SIPRI Yearbook 2000* (2000). The vast majority of armed conflicts in 1999 were in Africa and Asia; there were 11 in Africa, 9 in Asia, 3 in the Middle East, 2 in Europe and 2 in South America.

<sup>41</sup> As one of a number of studies has observed, in contemporary armed conflicts between Governments and rebels, between different opposition groups vying for supremacy and among populations at large '[d]istinctions between combatants and civilians disappear in battles fought from village to village or from street to street. In recent decades, the proportion of war victims who are civilians has leaped dramatically from 5 per cent to over 90 per cent. The struggles that claim more civilians than soldiers have been marked by horrific



conflicts and crises have revealed significant gaps and grey areas in existing international human rights law and subsequent failure in protecting the rights of vulnerable persons and groups, thereby underlining the need for the development of new or more advanced standards in regard to, for example, the participation of children in armed conflict and the protection and assistance of internally displaced persons. However, the conventional wisdom that treaty-making is the most effective means through which the international community can respond to such new and pressing human rights concerns is open to question.

There will of course be instances in which recourse to treaty-making will remain the preferred or in some cases the only option for the development of new and advanced standards. One such example is the drafting of the Optional Protocol to the Convention on the Rights of the Child raising the age for the participation of children in armed conflict. The object was essentially that of amending the relevant standards contained in the Convention. However, following the amendment procedures laid down in the Convention was likely to be a time consuming experience.<sup>42</sup> Moreover, the lack of political will in some quarters to develop appropriate standards seemed so great that resort to treaty-making served to raise the profile of the issue itself and mobilise political and legal impetus for protection efforts. Alternatively, there may be cases such as the recent establishment of a system for the submission of individual petitions to the Committee on the Elimination of Discrimination Against Women where the necessary legal basis for the extension of the Committee's mandate could only be obtained through the drafting and

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levels of violence and brutality. Any and all tactics are employed, from systematic rape, to scorched earth tactics that destroy crops and poison wells, to ethnic cleansing and genocide. With all standards abandoned, human rights violations against children and women occur in unprecedented numbers.' *Impact of armed conflict on children. Report of the expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to General Assembly resolution 48/157. A/51/306 (1996), para.78, and Add.1, Annex I, 'Statement of the First Regional Consultation on the Impact of Armed Conflict on Children in the Horn, Eastern, Central and Southern Africa'. See also Minimum humanitarian standards. Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21. E/CN.4/1998/87 (1998), paras. 24-37; and Report of the Secretary-General on the protection of civilians in armed conflict. S/1999/957 (1999) and various reports by human rights NGOs such as Human Rights Watch, *Getting Away with Murder, Mutilation, and Rape - New Testimony from Sierra Leone* (June 1999); *Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo* (October 1998). See also reports by other NGOs, for example African Rights, *Rwanda: Death, Despair and Defiance* (August 1995) and Amnesty International, *Ethiopia and Eritrea: Human Rights Issues in a Year of Armed Conflict*, AFR 04/03/99 (May 1999).*

<sup>42</sup> See section 1.4 in Chapter 2, concerning the lengthy saga of amendments to the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women concerning the size of the Committee on the Rights of the

adoption of the Optional Protocol to the Convention on the Elimination of Discrimination Against Women. Or, there may be cases such as human cloning, as referred to above, where the issues involved are so complex and unfamiliar that existing instruments are clearly inadequate and international regulation in the form of a treaty is seen as essential. Such cases notwithstanding, however, there are also issues such as internally displaced persons and HIV/AIDS for example, where treaty-making is not a feasible option, or where it would be simply too time-consuming and where the emphasis instead is on more flexible, 'softer' approaches to law-making.

### **3. The Limitations of Treaty-Making and Treaties**

Recourse to such alternative approaches can be seen to result to a large extent from the limitations of treaty-making as a form of standard-setting. In particular, three main factors may be cited to account for the declining utility of treaty-making in certain areas of human rights. These form the focus of Chapter 2. The first of these stems from the inherent contradiction in human rights treaty-making, notably that the object of the exercise is to produce standards to govern the behaviour of States *vis-à-vis* their citizens and others within their jurisdiction and yet it those same States which are the decisive actors in the treaty-making process. Among the difficulties this may give rise to is that of obtaining consensus among States on the object and purpose of the treaty and the means through which these are to be achieved. As will be shown, this in turn can have serious implications for the progress of negotiations and the adoption, signature, ratification and entry into force of the treaty in question.

The second factor undermining the potential for treaty-making as an effective means through which to seek to elaborate new or more advanced human rights standards lies in the fact that the treaty-making process (to the extent to which the process can be considered in generic terms) is beset by a range of structural and procedural weaknesses. These concern, for example, the initiation and planning of a treaty-making exercise, problems of coordination between different elements of the United Nations system with treaty-making responsibility, problems of normative inconsistency both within and between instruments, and a lack of requisite expertise in the drafting process.

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Child and the length of meetings of the Committee on the Elimination of Discrimination Against Women respectively.

The third factor which can be considered to undermine the potential utility, not so much of the treaty-making exercise itself as the end result, stems from various obstacles to the effective implementation of treaties. Each of these factors is addressed and analysed in detail in Chapter 2 below.

#### **4. Recourse to Alternative Techniques – The Case of Internally Displaced Persons**

The result of such problems and difficulties has been recourse to alternative standard-setting techniques, as exemplified by the efforts undertaken to develop a normative framework for the protection of and assistance to internally displaced persons and discussed in Chapter 3. Addressing the plight of internally displaced persons has emerged in recent years as one of the most pressing humanitarian, human rights and political issues now confronting the international community. Globally, there are an estimated 20 to 25 million persons,<sup>43</sup> forcibly displaced within the borders of their own countries, predominantly by conflict and human rights violations,<sup>44</sup> often in acute need of protection and assistance.<sup>45</sup> There are also

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<sup>43</sup> *Internally displaced persons. Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1998/50. E/CN.4/1999/79 (1999), para.1.* The imprecision is inevitable. In some countries where significant displacement exists reliable estimates are unavailable and in countries or areas where there is no United Nations or other international presence, groups of internally displaced persons can remain hidden or forgotten by the international community (*Ibid.*, at para.10).

<sup>44</sup> As the Secretary-General observed in 1992, '[t]he countries having large numbers of internally displaced persons are nearly all the scene of armed conflict or internal strife, or recently have been. Five such countries alone - Afghanistan, Ethiopia, Mozambique, Sri Lanka and the Sudan - account for an estimated nine to ten million internally displaced persons. Each of these countries has been affected by armed conflict, although other causes, including drought and widespread human rights violations, have also contributed to the number of internally displaced persons' [*Analytical report of the Secretary-General on internally displaced persons. E/CN.4/1992/23 (1992), para.18*]. According to one survey, conflict-induced displacement accounts for 4 million internally displaced persons in Sudan, 2 million in Angola, 1.8 million in Colombia, up to 1 million in Myanmar and Turkey. US Committee for Refugees, 'Principal Sources of Internally Displaced Persons as of 31 December 1999'. Available at [www.refugees.org/world/statistics/wrs00\\_table5.htm](http://www.refugees.org/world/statistics/wrs00_table5.htm). See further F. Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993); R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (1998), and *The Forsaken People: Case Studies of the Internally Displaced* (1998). See also, J. Hampton (ed), *Internally Displaced People: A Global Survey* (1998); D.A. Korn, *Exodus within Borders: An Introduction to the Crisis of Internal Displacement* (1998); and the reports prepared by the Representative of the Secretary-General on Internally Displaced Persons, available at [www.unhchr.ch](http://www.unhchr.ch)

<sup>45</sup> See for example, Cohen and Deng, *ibid.*, at 2: 'Of the world's populations at risk, internally displaced persons tend to be among the most desperate. They may be forcibly resettled on political or ethnic grounds or find themselves trapped in the midst of conflicts and in the direct path of armed attack and physical violence. On the run without documents, they are easy targets for roundups, arbitrary detention, forced conscription, and sexual assaults.'

millions of persons internally displaced by natural disasters and other related causes.<sup>46</sup> Not surprisingly, some have described internal displacement as 'the hot issue for a new millennium.'<sup>47</sup> Others have been less sensationalist perhaps but have still conveyed the enormity of the problem and the plight of those affected. For example, Kofi Annan, the United Nations Secretary-General, has referred to internal displacement as one of the great human tragedies of our time: 'The severity of the problem, both in intensity and scope, is obvious from the numbers of the displaced ... and the fact that virtually no region of the world is spared from this epidemic.'<sup>48</sup>

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Uprooted from their homes and deprived of their resource base, many suffer from profound physical and psychological trauma. They are more often deprived of shelter, food and health services than other members of the population.'

<sup>46</sup> A 1992 report by the Secretary-General defines the internally displaced as persons, 'who have been forced to flee their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country' [E/CN.4/1992/23, para.17]. For several years, this constituted the working definition of internally displaced persons as used, *inter alia*, by the Representative of the Secretary-General on Internally Displaced Persons. The definition was considered satisfactory as it contained the two crucial elements of internal displacement (coerced or involuntary movement and remaining within one's national borders) as well as its major causes.

Of course, defining a phenomenon as multifaceted as internal displacement is not an exact science. As the Representative notes, 'any definition of the concept risks either being too narrow or too broad, with the result that people who need protection and assistance might be excluded or the category might become too diffuse to be manageable' [*Comprehensive study prepared by Mr. Francis M. Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to Commission on Human Rights resolution 1992/73, E/CN.4/1993/35 (1993), para.33*]. The working definition was revised in 1998 for the purposes of the Guiding Principles on Internal Displacement and in view of deficiencies which became apparent with the increased focus on the issue following the Representative's appointment in 1992. According to the revised definition, internally displaced persons are 'persons or groups of persons who have been forced to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border. *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Guiding Principles on Internal Displacement. E/CN.4/1998/53/Add. 2 (1998).*

The present definition is an improvement on the original working definition in several respects. Firstly, the use of the qualifier 'in particular' in connection with the major causes of internal displacement indicates that the list of causes illustrative rather than exhaustive, thereby avoiding the danger of excluding persons that may in the future require protection. Secondly, the revised definition disposes of the temporal and quantitative aspects of the working definition as, by way of example, in Iraq there was nothing 'sudden or unexpected' about the displacement of Kurds which took place over a considerable period in the late 1970s, 1980s and early 1990s; and in Colombia, internally displaced persons often flee in 'small' rather than 'large' numbers. Thirdly, the revised definition broadens the notion of coerced flight to encompass not just those 'forced to flee' but those 'forced to leave' as well, the latter being those who have been expelled or forcibly moved from their homes as has occurred in Myanmar, Iraq, Ethiopia, and former Yugoslavia. See further, Cohen and Deng, note 44 above, at 16-19.

<sup>47</sup> As used on the cover page of UNHCR's publication *Refugees*, Vol.4, No.117 (1999).

<sup>48</sup> Kofi Annan, in Cohen and Deng, note 44 above, at xix.

In 1992, in response to the growing international concern at the large number of internally displaced persons throughout the world and their need for assistance and protection, the United Nations Secretary-General, at the request of the Commission on Human Rights, appointed a Representative of the Secretary-General on Internally Displaced Persons, Francis Deng.<sup>49</sup> The mandate of the Representative has since been renewed on four occasions, most recently in April 2001.<sup>50</sup> During this time the mandate has focused on three main areas of work: visits to countries affected by internal displacement; promoting an institutional framework at both the international and regional levels; and developing a normative framework to meet the protection, assistance and development needs of internally displaced persons.<sup>51</sup>

It is in this latter respect that the Representative's approach has differed significantly from that adopted by the great majority of other special procedures of the Commission on Human Rights. While some have called for the additional standard-setting they have tended to focus on new treaties as providing the best way of filling the gaps which they have identified in the existing normative structure.<sup>52</sup> Other mechanisms have directed their attention away from standard-setting.

The Representative's activities in regard to developing a normative framework demonstrate in many respects an innovative and more nuanced approach to human

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<sup>49</sup> CHR res. 1992/73. It should be noted that while the author is currently employed as a senior research associate to the Representative of the Secretary-General on Internally Displaced Persons, the views reflected herein are the author's own and do not necessarily reflect those of the Representative.

<sup>50</sup> See CHR res. 1993/95, 1995/57, 1998/50 and 2001/54.

<sup>51</sup> The Representative efforts in these respects are detailed in his reports as submitted annually to the Commission on Human Rights and biennially to the General Assembly. The reports are available on the website of the Office of the High Commissioner for Human Rights at [www.unhchr.ch](http://www.unhchr.ch)

<sup>52</sup> For example, the Special Rapporteur on Violence Against Women has called for the adoption and ratification of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women which would allow women the right to seek redress for the violation of their human rights (which subsequently came to fruition). She also recommended that the international community consider the possibility of adopting an international convention on the elimination of violence against women. There does not at present exist a comprehensive international legally binding instrument on violence against women, and the position of the Special Rapporteur is only an ad hoc mechanism with no avenue for redress. See *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85*. E/CN.4/1996/53 (1996), paras. 143-144. Also, the Special Rapporteur on summary, arbitrary or extrajudicial executions has recommended the adoption of a convention, similar to the Convention against Torture, which would provide domestic courts with international jurisdiction over persons suspected of having committed mass violations of the right to life; such a convention should also contain provisions for the allocation of a voluntary fund for victims. See *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*. A/51/457 (1996).

rights standard-setting. In developing a normative framework the Representative has sought to consolidate the relevant provisions of international human rights and humanitarian law, and refugee law by analogy, and to address gaps and grey areas therein, not by recommending or seeking the drafting by Governments of a 'hard' treaty on internally displaced persons but through a 'soft' restatement by non-governmental actors of existing norms in the form of the 'Guiding Principles on Internal Displacement', as presented to the Commission on Human Rights in 1998. It is because of this emphasis, and the innovation that it represents in certain respects, that these standard-setting activities form the principal focus of this work.

The approach developed by the Representative has a number of advantages. First, he has been able to avoid the time consuming pitfalls of the traditional intergovernmental treaty-making process. Second, in developing the Principles through a twin-track process of working both outside and within the United Nations system, the Representative has been able to make more effective use of a broader range of expertise and has been able to mobilise a broader range of actors to support the process in financial and political terms.

Although, unlike a treaty, the Principles do not constitute a legally binding instrument and, therefore, do not give rise to binding obligations for States, they nonetheless contribute to an important standard-setting process which has major implications for the protection and assistance of the internally displaced as discussed in Chapter 4. Their acknowledgment by the Commission on Human Rights in 1998 effectively opened the way for their dissemination and application by the Representative in his dialogues with governments, intergovernmental, regional and non-governmental organisations, and for their use by such organisations. Therefore, irrespective of their lack of actual binding legal force, through the state-sanctioned efforts of the Representative and other actors such as United Nations agencies and non-governmental organisations (NGOs), the Guiding Principles are increasingly coming to provide the normative framework within which international, and to a lesser extent national, protection and assistance activities on behalf of the internally displaced are conducted.

The implications of this for the processes of human rights law-making are discussed in Chapter 5, the key point being that while the development of the Guiding Principles is not necessarily a blueprint for the future of human rights law-making, neither is the drafting a binding treaty necessarily a *sine qua non* for the

development of an effective normative framework if the instrument in question is based on sound principles and can be successfully implemented in practice. On the contrary, the case of the Principles demonstrates that the collaboration of a broad range of governmental, intergovernmental and non-governmental actors can result in the elaboration of an instrument which may be broader in scope and more progressive in content and, if reinforced by suitable measures and means of promoting and ensuring implementation, more effective than a treaty in regulating the activities of States in the areas which it addresses. Beyond this, the case of the Guiding Principles is indicative of a broader trend characterised by a gradual but nonetheless fundamental change in the nature of international law-making in a globalising world. That is to say, a world in which a broad and diverse range of non-governmental actors are becoming increasingly effective in influencing the international agenda.





## THE LIMITED EFFECTIVENESS OF TREATY-MAKING

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According to conventional wisdom, treaty-making is the most effective means through which the international community can respond to new and pressing human rights concerns. This view is increasingly open to question as a result of three main limitations: the problem of reaching consensus among States and its implications for the negotiation, adoption, ratification and entry into force of a treaty; structural and procedural weaknesses of the treaty-making as well as other traditional state-centred standard-setting techniques; and finally, obstacles to the effective implementation of treaties. The lack of effective efforts to overcome these various limitations has served to undermine the attractiveness and utility of treaty-making as a form of law-making and prompted recourse to alternative techniques.

### 1. The Problem of Consensus and its Implications

There is a contradiction or dilemma in human rights treaties and treaty-making stemming from the introverted nature of such treaties and the central role played by States in their drafting and implementation. Depending on the nature, sensitivity and complexity of the issue at hand, this contradiction can give rise to difficulties in obtaining broad agreement or consensus among States during the negotiation and drafting of a treaty which, in turn, may have negative repercussions for the conclusion of the treaty-making exercise and the ratification and entry into force of the treaty.

In contrast to general international law which is predicated on inter-state relations,<sup>1</sup> the obligations arising from human rights treaties are effectuated *within* rather than *between* States. Thus, while treaties in the traditional areas of international relations are reciprocal in that they relate to and regulate some interaction among their Parties, such as consular relations, this element of benefits and burdens

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<sup>1</sup> As Bruno Simma observes: 'If one examines its traditional patterns and processes, international law appears to be essentially 'bilateral minded'. This means that as a rule international legal obligations exist on the level of relations between pairs of individual States. Therefore international law does not oblige States to adopt a certain conduct in absolute ... but only in relation to the particular state or States to which an international legal obligation is owed.' Simma, 'International Human Rights and General International Law: A Comparative Analysis', 4 (2) *AEL* (1995) 168.

running between the Parties is absent in human rights treaties. The obligations arising from a human rights treaty do not lead to any tangible give and take between States Parties: 'the mutual rights of States Parties are not accompanied by any material benefits. As a consequence, reciprocity has very little, if any, basis on which to operate'.<sup>2</sup>

True, it may be argued from a normative or theoretical point of view that human rights treaties do give rise to rights and obligations between their Parties to the effect that any state party is obliged as against any other state party to perform their obligations in good faith and that any other party has a correlative right to integral performance by all other contracting Parties. As such, the obligations can be considered obligations *erga omnes* - 'the *omnes* limited ... to the circle of all other contracting Parties'.<sup>3</sup> Simma, for example, citing the International Court of Justice in its 1966 *South West Africa* judgement argues that although Parties to human rights treaties do not exchange any tangible benefits it does not necessarily follow that this lack of sociological reciprocity leads to the absence of reciprocal rights and duties. As the Court held:

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<sup>2</sup> Ibid., at 170. This view came to the fore in proceedings before the International Court of Justice leading to its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. The British Government argued that 'in the case of conventions of a commercial, technical or general type, ... the obligations ... are essentially reciprocal and operate between Parties, i.e. from each one towards each of the others separately'. In the case of a treaty such as the Genocide Convention 'there are no obligations ... between Parties. Each party assumes obligations, it is true, but they are not obligations to be executed towards or for the benefit of other States... [T]his type of convention does not provide for reciprocal benefits between the Parties of a tangible character. It provides almost exclusively for the assumption by them of obligations ... not dependent on the assumption of a similar obligation by the other Parties... In short, we are in the presence here of absolute obligations, not subject to any consideration of reciprocity at all'. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Pleadings, 64 and 387-8.

See, also, the decision of the European Commission of Human Rights in *Austria v. Italy* in which it held that 'the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to ... establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law'. The Commission continued that the obligations undertaken by the High Contracting Parties 'are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties, than to create subjective and reciprocal rights for the High Contracting Parties themselves'. *Austria v. Italy*, Appl. No. 7881/60, 4 YECHR (1961) 138 and 140. See also the advisory opinion of the Inter-American Court of Human Rights in *Effect of Reservations on the Entry into Force of the American Convention (Advisory Opinion OC-2/82)* (1982), ILR, 67, 558, 568, para.29; and *Restrictions to the Death Penalty (Advisory Opinion OC-3/83)* (1983), ILR 70, 449, 466. In both cases the Court held that human rights treaties are not multilateral treaties of the traditional type giving rise to reciprocal exchange of rights between States Parties.

<sup>3</sup> Simma, note 1 above, at 199.

a legal right or interest need not necessarily relate to anything material or 'tangible', and can be infringed even though no prejudice of a material kind has been suffered. In this connection the provisions of certain treaties and other international instruments of a humanitarian character ... are cited as indicating that, for instance, States may be entitled to uphold some general principle even though the particular contravention of it alleged has not affected their own material interests; - that again, States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages.<sup>4</sup>

According to the International Law Commission (ILC), in international law 'there is always a correlation between the obligation of one subject and subjective right of another',<sup>5</sup> i.e., international obligations do not exist *in abstracto*; they must be owed toward one subject or to several or all subjects of international law.<sup>6</sup> The principle that States may be entitled to uphold some general principle even though the violation thereof by another state party has not affected their own material interests is provided for in a number of United Nations human rights treaties which allow for the referral of disputes between States Parties to the International Court of Justice<sup>7</sup> and/or to treaty monitoring bodies.<sup>8</sup>

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<sup>4</sup> *South West Africa, Second Phase* (Judgement) ICJ Reports (1966) 32. Cited in Simma, *ibid.*, at 198-99. Also in support of this view, Simma cites Sir Gerald Fitzmaurice in his reports on the law of treaties to the ILC. In his second report, Fitzmaurice referred to the non-reciprocal nature of human rights treaties, that human rights obligations were of an absolute rather than a reciprocal character. However, in his fourth report he notes that in the case of multilateral treaties, a party to a treaty 'has a duty towards the other party or Parties to carry it out, irrespective of whether any direct benefits to such other party or Parties will accrue there from; and correspondingly, any party to a treaty has, as the counterpart of its own obligation, the right to require due performance by any other party of its obligations under the treaty, irrespective of any such factor.' *Fourth report on the law of treaties*, A/CN.4/120, cited in Simma, *ibid.*

<sup>5</sup> YBILC, Vol. II, Part 2 (1976) 76.

<sup>6</sup> M. Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992) 163-4. Similarly, the European Court of Human Rights in *Ireland v. United Kingdom* held that 'unlike international treaties of the classic kind, the [European Convention on Human Rights] comprises more than mere reciprocal engagements between contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".' *Ireland v. United Kingdom* (1978) ECHR, Ser. A, No. 125, 90.

<sup>7</sup> Art.22 of the Convention on Racial Discrimination, for example, provides that '[a]ny dispute between two or more State Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the Parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.' See also Art.IX of the Convention on the Prevention and Punishment of the Crime of Genocide, Art.30 of the Convention Against Torture, and Art.44 of the ICCPR which

While in theory States may be entitled to uphold some general principle without having been affected by its violation, in practice they rarely follow such a course. In fact, States have never referred a dispute concerning the violation of human rights obligations to the International Court of Justice<sup>9</sup> or the United Nations treaty monitoring bodies<sup>10</sup> in respect of treaties which provide for such a course of action.

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provides differently that the provisions for the implementation of the Covenant 'shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialised agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.'

<sup>8</sup> Art.41 of the ICCPR, for example, provides that a state party to the ICCPR may at any time declare that it recognises the competence of the Human Rights Committee to receive and consider communications alleging the non-fulfilment of obligations on the part of another State Party, albeit contingent on the recognition of the competence of the Committee on the part of the respondent State. Similar provisions are to be found in the Convention on Racial Discrimination (Arts.11-13) and the Convention Against Torture (Art.21) and the Migrant Workers Convention (Art.76) which is yet to enter into force. Unlike the ICCPR and the Convention Against Torture, the procedure for inter-state complaints under the Convention on Racial Discrimination applies without any formal declaration by States Parties to that effect. The inter-state procedure is also provided for in regional systems, specifically under the European Convention on Human Rights (Art.33, as amended by Protocol No. 11) and the African Charter on Human and Peoples' Rights (Arts.47-54) under both of which it is compulsory, and the American Convention on Human Rights where it is dependent on the consent of both Parties to the dispute (Art.45).

For an overview of the various inter-state dispute procedures, including those of the International Labour Organisation and the United Nations Educational, Scientific, and Cultural Organisation, see Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?', 10 *HRQ* (1988) 249.

<sup>9</sup> Perhaps the most striking example of the failure of States to submit an application to the ICJ when the possibility for doing so existed can be seen in regard to States' response to 'one of the clearest cases of genocide since World War II: Democratic Kampuchea from 1975 to 1978', which claimed the lives of between one-seventh and one-third of the Cambodian people. As Kamminga (note 6 above, at 147) observes, an application to the ICJ could have been lodged under Art.9 of the Genocide Convention, to which Cambodia had acceded in 1950 without reservations. It could also have been lodged under Art.36(2) of the Statute of the ICJ - Cambodia accepted the Court's compulsory jurisdiction in 1957, and genocide constitutes a breach of customary international law. Quoting Hannum, 'International Law and the Cambodian Genocide: The Sounds of Silence', 11 *HRQ* (1989) 136, Kamminga notes that no applications were filed because the Association of South East Asian Nations (ASEAN) expressed concern that an application to the ICJ would, by attacking one of the members of the Coalition Government of Democratic Kampuchea (CGDK), indirectly support the continuing Vietnamese occupation of Cambodia by weakening opposition forces. Other States in the region, such as Australia, fear that filing a case against Democratic Kampuchea might somehow constitute recognition of the CGDK or query the technical difficulties. European and other States simply defer to those closest to the situation, and all seem wary of combining issues of self-determination and human rights.

<sup>10</sup> Perhaps as an omen for the future it is worth noting that at the time of writing, of the 142 States Parties to the ICCPR only 45 (31%) have recognised the competence of the Human Rights Committee to receive inter-state communications (see *Report of the Human Rights Committee*, A/53/40 (1998), Annex I.) and of the 105 States Parties to the Convention Against Torture only 39 (37%) have recognised the competence of the Committee Against Torture to receive inter-state complaints (see *Report of the Committee Against Torture*, A/53/44 (1998), at para.1 and Annex III). Slightly more optimistically, in a sense at least, States Parties to the Convention on Racial Discrimination have brought to the attention of the

And the reason for this is simple, yet quite fundamental: the beneficiaries of human rights treaties are not the States Parties themselves but their inhabitants. Notwithstanding the number of human rights treaties and Parties thereto and, thus, the apparent interest of States in the protection of human rights, States are generally disinclined to respond, particularly on a unilateral basis, to another state's violation of the rights of its own population.<sup>11</sup> Writing in 1988, Scott Leckie observed that the inter-state procedure is seen as a 'hostile and quite drastic response by a state desiring to address human rights questions in another state'. Therefore, 'it continues to be viewed with scepticism and apprehension of its economic or political repercussions'.<sup>12</sup> As we embark upon the twenty-first century, the situation is little changed.

However academic the 'rights without benefits' argument may be, it does at least underline the introverted nature of human rights treaties; that the essential characteristic of the international law of human rights is to 'expose domestic issues, to turn them into issues of international concern, to erode national sovereignty with regard to these subject matters. It involves a permanent confrontation and - hopefully - reconciliation between internationally agreed standards and domestic, often deeply entrenched, values, rules and habits'. However, the international law of human rights 'is still placed in - and run by - a world of sovereign States'.<sup>13</sup>

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Committee on the Elimination of Racial Discrimination situations pertaining in the territories of, or as a result of the actions of, another State Party which call into question the fulfilment by the latter State of its obligations under the Convention. This has however, occurred within the context of Art.9 of the Convention under which States submit periodic reports on the implementation of the Convention to the Committee, i.e., not under the mechanism providing for inter-state communications. The Committee adopted General Recommendation XVI (1993) concerning the application of Art.9 which states that the Committee has noticed that, on some occasions, reports have made references to situations existing in other States - a practice termed by Thomas Buergenthal as 'disguised inter-state disputes'. The Committee reminded States Parties that Art.11 is the only procedural means available to States for drawing the Committee's attention to situations in which they consider that another State Party is not giving effect to the provisions of the Convention. See Buergenthal, 'Implementing the UN Racial Convention', 12 *Texas Int'l. L. J.* (1977) 218, and Partsch, 'The Committee on the Elimination of Racial Discrimination', in P. Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 362.

<sup>11</sup> As Henkin points out, '[m]any States, themselves still lacking an entrenched human rights culture, themselves vulnerable to charges of violation, are reluctant to respond (surely to respond unilaterally) to a violation by another friendly State of the human rights of that State's own inhabitants'. Henkin, 'International Law: Politics, Values and Functions', 4 *RdC* (1989) 253.

<sup>12</sup> Leckie, note 8 above, at 299. Nevertheless, the author concluded that this procedural option must remain an element of international human rights law if the system as a whole is ever to achieve its desired goals.

<sup>13</sup> Simma, note 1 above, at 171.

And herein lies the dilemma. Human rights treaties commit States to a certain behaviour above all in regard to their own citizens and thus impact on a state's domestic law and legal and institutional traditions to a large degree. But human rights treaties are initiated, negotiated, drafted, signed, ratified and implemented by States. All texts adopted by intergovernmental organisations are the result of decision-making by state representatives: 'States are the actors in the international legislative process'.<sup>14</sup> The principal standard-setting organs, in particular, the General Assembly and the Commission on Human Rights are composed of state representatives. Texts initiated within a United Nations body invariably stem from a proposal made by one or more governments sitting on it. In the preparation of instruments the initiating bodies have generally found it to their advantage to secure the comments of governments on the drafts submitted to them and to request the Secretariat to prepare a working paper presenting and analysing the replies received. It is the States represented in the General Assembly, or at international conferences, which adopt human rights treaties and open them for signature, ratification and accession and which express their consent to be bound by the provisions of a treaty by signing, ratifying or acceding to it. All of these stages are dependent on the political will and interests of the States concerned which may be influenced by the nature, sensitivity, and complexity of the issue at hand. This can have important ramifications for achieving consensus among States on the details of a treaty and, consequently, for the progress of negotiations and the ratification and entry into force of a treaty.

Consensus, described as the 'adoption of a text without a vote and by no objection',<sup>15</sup> or as the 'taking of decisions by general agreement in which those States that oppose an issue do not press for a formal vote, thereby allowing the majority view to prevail',<sup>16</sup> has come to play an increasing role in United Nations decision-making, with the adoption of texts by vote becoming more the exception than the rule.<sup>17</sup> In the early 1960s, it became evident that developing States composed a broad majority within the United Nations and that by lining up with Socialist countries, they were able to command a two-thirds majority. Consequently, they were in a position to pass resolutions reflecting their

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<sup>14</sup> van Boven, 'General Course on Human Rights', IV-2 AEL (1993) 46.

<sup>15</sup> Suy, 'The Meaning of Consensus in Multilateral Diplomacy', in R. Akkerman *et al.* (Eds), *Liber Rölling, Declarations on Principles; A Quest for Universal Peace* (1977) 247.

<sup>16</sup> *Ibid.*

<sup>17</sup> Suy, 'Innovations in International Law-Making Processes', in R. St. J. Macdonald, D.M. Johnston and G.L. Morris, *The International Law and Policy of Human Welfare* (1978) 194.

preferences. It soon became apparent, however, that in the absence of support from the powerful minority of developed States any international action was doomed to failure.<sup>18</sup> The discrepancy between the power of the numerical majority and the actual influence of the developed States - the 'divorce of power from voting majorities'<sup>19</sup> - led to the need for a technique that would 'ensure very broadly based support for decisions in a highly divided system'.<sup>20</sup> Hence the increased emphasis on consensus as a negotiation and decision-making technique,<sup>21</sup> one consisting of a 'collective effort to agree upon a text by reconciling different views and smoothing out difficulties', culminating in the adoption without vote of a text basically acceptable to everyone.<sup>22</sup> The technique certainly has its advantages. It fosters negotiation and compromise and the prospective minority becomes involved in the process and can ensure that its interests are safeguarded. It also has its drawbacks however.

### 1.1 Protracted or Stalled Negotiations

In the first place, negotiations may become 'bogged down in interminable discussions and trade-offs, because each State or group feels that the more it holds out, the more likely is its counterpart to abandon its initial bargaining position and make substantial concessions'.<sup>23</sup> This may result in two possible scenarios. Firstly, there may be a 'fatal tendency towards the lowest common denominator'.<sup>24</sup> In trying

<sup>18</sup> See A. Cassese, *International Law in a Divided World* (1986) 195; and G.M. Danilenko, *Law-Making in the International Community* (1993) 277.

<sup>19</sup> Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea', 75 *AJIL* (1981) 326.

<sup>20</sup> *Ibid.*, at 327.

<sup>21</sup> For Sohn, this is how it should be: 'The peace of the world is not promoted by a majority riding roughshod over a significant minority'. He then quotes the following passage from Claude: 'Excessive emphasis upon the power to mobilise a voting majority obscures the fundamental truth that, in the world as it really is, voting does not solve problems or resolve conflicts. The case for old-fashioned unanimity is not that it comports with the old-fashioned doctrine of sovereignty, but that it focuses attention upon the present reality that the great issues of international conflict will yield only to the process of persuasion, compromise, and agreement. Majoritarianism serves the world badly when it puts a premium upon the unacceptable proposal which can be voted over minority opposition rather than the bargaining proposal which may be tailored to agreement with the minority'. I. Claude, *Swords into Ploughshares: the Problems and Progress of International Organisation* (1971), cited in Sohn, 'United Nations Decision-Making: Confrontation or Consensus?', 15 *Harvard Int'l L. J.* (1974) 444.

<sup>22</sup> Cassese, note 18 above, at 196.

<sup>23</sup> *Ibid.*, at 196.

<sup>24</sup> Zemanek, 'Majority Rule and Consensus Technique in Law-Making Diplomacy', in R. St. J. Macdonald and D. M. Johnston (eds), *The Structure and Process of International Law* (1983) 876. See also Rüdiger Wolfrum: 'The consensus procedure is not merely a technique but has an impact on the way negotiations are conducted and the results achieved. The agreed

to reach accommodation, States with divergent and strongly held interests, may settle on the lowest-common denominator expressed in vague compromise language, often open to interpretations reflecting the original negotiating positions of the States involved. Secondly, treaty negotiations may become protracted and sometimes stalled for long periods, perhaps even indefinitely.

### 1.1.1 Religious Intolerance

A not particularly recent, but nonetheless instructive example in this regard is the attempt of the United Nations to draft a convention on religious intolerance which, due to the lack of consensus among States on the nature of freedom of religion and belief, became indefinitely stalled in 1974 - some 12 years after the issue of a convention was first discussed in the General Assembly.<sup>25</sup> In 1962, in reaction to outbreaks of anti-Semitism and other forms of racial and religious prejudice, the General Assembly decided to formulate a declaration and a convention on the elimination of all forms of religious intolerance, and an identical set of instruments on the elimination of all forms of racial discrimination.<sup>26</sup> While the Declaration and subsequent Convention on Racial Discrimination were successfully adopted by the General Assembly in 1963 and 1965 respectively, the contemplated declaration and convention on the elimination of religious intolerance fared less well<sup>27</sup> as negotiations became plagued by ideological confrontation.<sup>28</sup> By 1964, six articles of

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text will almost certainly be the lowest common denominator of the interests of those who have participated in the negotiations.' Wolfrum, 'Article 18', in B. Simma *et al.*, (eds), *The Charter of the United Nations: A Commentary* (1994) 325.

<sup>25</sup> See generally, Claydon, 'The Treaty Protection of Religious Rights: UN Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', 12 *Santa Clara Lawyer* (1972) 403; Clark, 'The United Nations and Religious Freedom', 11 *NYU J. Int'l. L. & Pol* (1978) 197; M.S.McDougal, H.D. Lasswell, and L. Chen, *Human Rights and World Public Order* (1980) 677-685; Lerner, 'Toward a Draft Declaration Against Religious Intolerance and Discrimination', 11 *Israeli YHR* (1981) 82, and 'The Final Text of the UN Declaration Against Intolerance and Discrimination Based on Religion or Belief', 12 *Israeli YHR* (1982) 185; Liskofsky, 'The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives', in L. Pfeffer (ed), *Religion and the State* (1985) 441; Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', 82 *AJIL* (1988) 487; and B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection* (1996).

<sup>26</sup> GA res. 1780 and 1781 (XVII) (1962).

<sup>27</sup> Liskofsky, note 25 above, at 461, for example, observes that action on the racial question was indeed 'swift' whereas efforts to advance religious freedom and non-discrimination 'moved exceedingly slowly and all but petered out'.

<sup>28</sup> Writing three years before the adoption of the Declaration, Clark, note 25 above, at 220, observes that 'efforts to move things along at the United Nations have tended to come from some of the smaller liberal Western countries such as The Netherlands and Sweden. Efforts to slow things down have been made primarily by the USSR, aided by the representatives of



a draft declaration had been prepared, and a draft convention, including a preamble and 13 articles and possible implementing provisions was submitted to the General Assembly in 1967. By 1968 the General Assembly was only able to adopt a controversial preamble to the convention and no further work was done on either the convention or declaration until 1972 when the General Assembly set aside the convention to concentrate on the declaration.<sup>29</sup> It was a further nine years before the Commission was able to adopt a final draft for submission to the General Assembly - though only after its Western members reluctantly agreed to bypass the prevailing understanding that decisions be made by consensus.<sup>30</sup> Following some final amendments in the Third Committee, the draft declaration was adopted in 1981.<sup>31</sup>

Although some envisaged the completion of the Declaration as helping to crystallise any emerging consensus which might then be followed by a more detailed and enforceable convention,<sup>32</sup> and despite subsequent calls for the elaboration of a draft convention,<sup>33</sup> no progress has been made in this regard. The Commission, recognising the important contribution which a legally binding international instrument could make towards eliminating religious intolerance, invited the Secretary-General in 1987 to submit a report to its forty-fourth session based on the comments of Member States on the modalities by which such an undertaking could be pursued, including the possible establishment of an open-ended working group to prepare a draft convention.<sup>34</sup> The majority of the small number of 14 States which replied to the Secretary-General's *note verbale*, favoured the adoption of a legally binding instrument some time in the future, but considered the establishment of an open-ended working group premature. The United States expressed concern that discussions on a convention concerning freedom of religion and belief, 'with an inevitably long negotiation and ratification process', would divert attention and scarce resources from both the 1981 Declaration and the Commission's Special Rapporteur on the question of religious intolerance, and might detract from the

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the Ukrainian SSR and the Byelorussian SSR. The Arab States have not taken a particularly active role either way (other than to ensure that the instruments do not contain a specific reference to any particular kind of intolerance, especially anti-Semitism). Nor indeed have most of the African, Asian and Latin American States.'

<sup>29</sup> GA res. 3027 (XXVII) (1972).

<sup>30</sup> Liskofsky, note 25 above, at 463.

<sup>31</sup> UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by GA res. 36/55 (1981).

<sup>32</sup> Clark, note 25 above, at 208.

<sup>33</sup> See, for example, *Study of the current dimensions of the problems of intolerance and of discrimination on grounds of religion or belief*. E/CN.4/Sub.2/1987/26 (1986), para.234.

impact and significance of both.<sup>35</sup> Along with several other Western States, the United States believed that it was for these very reasons the Soviet Union had begun to advocate the formation of a working group to draft a convention.<sup>36</sup> And perhaps with good cause, the Soviet Union had, after all, resisted the very idea of a special instrument on religious intolerance during the drafting of the Declaration.<sup>37</sup> At its forty-fourth session the Commission requested the Sub-Commission to examine the issues and factors which should be considered before undertaking any attempt to draft a binding instrument on freedom of religion or belief.<sup>38</sup>

The resulting working paper by the Sub-Commission's expert, Theo van Boven, contained an analysis of the issues and factors to be considered if the United Nations were to embark upon the drafting of a convention, the gist being that the United Nations should concentrate, for the time being, on how to enhance the implementation of existing standards. Should the United Nations decide to prepare a draft convention, van Boven advised the adoption of a diligent approach.<sup>39</sup>

I recommended solid preparatory work on the basis of sound research and careful analysis, if it was to be decided to draft such a binding instrument at all. I also pointed out that any drafting process should be accompanied by consultation and dialogue among interested groups, organisations and movements from across a broad socio-political and religious spectrum. It is my considered view that the complexity of the subject matter and the political divisiveness of religious prejudice and intolerance warrant a great deal of diligence and wisdom. In addition, the issue of implementation merits thought and reflection in terms of long-term approaches and solutions.<sup>40</sup>

Pursuant to van Boven's findings, the Sub-Commission did not call for the drafting of a convention and noted that before any such drafting were to take place, it would be necessary to undertake 'careful preparatory work, sound research and analysis,

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<sup>34</sup> CHR res. 1987/15.

<sup>35</sup> E/CN.4/1998/44/Add.2 (1988), cited in Tahzib, note 25 above, at 214.

<sup>36</sup> Sullivan, *Human Rights at the UN: Fighting Religious Intolerance*, In Brief Series, No. 1 (1988) 2, cited in Tahzib, note 25 above.

<sup>37</sup> Liskofsky, note 25 above, at 462.

<sup>38</sup> CHR res. 1998/55.

<sup>39</sup> *Elimination of all forms of intolerance and discrimination based on religion or belief*. E/CN.4/Sub.2/1989/32 (1989), para.20.

<sup>40</sup> van Boven, 'Advances and Obstacles in Building Understanding and Respect Between Peoples of Diverse Religions and Beliefs', 13 *HRQ* (1991) 444-45 (footnote omitted).

along the lines of General Assembly resolution 41/120'.<sup>41</sup> Resolution 41/120, adopted by the Assembly in 1986, invites Member States and United Nations bodies to keep in mind several guidelines in developing international instruments in the field of human rights, namely that such instruments be consistent with the existing body of international human rights law; be of fundamental character and derive from the inherent dignity and worth of the human person; be sufficiently precise to give rise to identifiable and practicable rights and obligations; provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and attract broad international support.<sup>42</sup>

The Commission, at its forty-sixth session in 1990, welcomed with appreciation the working paper prepared by van Boven but took the issue no further.<sup>43</sup> In many respects, the working paper reflects the view held by others that given the complexity and sensitivity of the issues involved, as well as the lengthy drafting process leading to the adoption of the Declaration, efforts should be focused on securing the implementation of the latter rather than elaborating a legally binding convention. Such a course would not only be lengthy and costly, but would also provide an opportunity for States 'to attach many more exceptions and other escapes to a legally binding instrument than they have to the declaration, thus diminishing the value of both.'<sup>44</sup>

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<sup>41</sup> Sub-Comm'n res. 1989/23.

<sup>42</sup> Ibid., at para.164. GA res. 41/120 incorporates a number of basic criteria formulated by Alston in 'Conjuring Up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607. A brief survey of the proclamation of new human rights by United Nations organs between 1972 and 1983 led Alston to conclude that the process by which new rights have recently been proclaimed has suffered from a number of shortcomings, such as the lack of prior discussion and analysis of the major implications of the proposed innovation; no attempt to seek comments from governments, specialised agencies and non-governmental organisations; the absence of a request to the Secretariat or to any other expert group for advice on technical matters relating either to the general principles involved or to the specific formulations to be used proposed; no explicit recognition that a new human right is being proclaimed; and insufficient debate on the basis of which to ascertain the real intentions underlying the affirmative votes of States. 'One result is that many of the new rights are characterised by inordinate vagueness.' To avoid this Alston proposed a number of substantive and procedural requirements which amount to 'the human rights equivalent of the French system of *appellations contrôlées* applied to wines from the best wine growing regions'. At 618.

<sup>43</sup> CHR res. 1990/27.

<sup>44</sup> Liskofsky, note 25 above, at 476. See also Sullivan, note 25 above, at 519: 'A major factor militating against the advisability of undertaking new standard-setting in the near future is the danger of weakening the considerable normative force of the Declaration.'

### 1.1.2 Involvement of Children in Armed Conflict

Another example of stalled negotiations due to the absence of consensus among States on key issues was the drafting of the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Despite the 'common perception that there is an urgent need to take action to strengthen the protection of children in armed conflicts through more advanced international standards, the central issue being to protect children from being used in combat',<sup>45</sup> it took six years of negotiation<sup>46</sup> before consensus was achieved on increasing the minimum age for participation (but not recruitment) in hostilities to 18 years.<sup>47</sup>

While the majority of States supported a clearly designated limit of 18 years for participation, whether direct or indirect, several States expressed the opinion that new standards, in order to be enforceable, should enjoy the support of a vast majority of States. On this basis, the establishment of an age limit of 18 years was not considered 'a practical and practicable proposal acceptable to all'. For some States, the real problem lay not in the debate about the higher standard 'but in the lack of implementation of existing standards, which would eliminate the real problem

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<sup>45</sup> *Report of the Chairman of the working group prepared pursuant to Commission resolution 1998/76. E/CN.4/1999/WG.13/3 (1999), reproduced as an annex to Report on the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its fifth session. E/CN.4/1999/73 (1999), para.10. See also para.19 referring to a statement by the High Commissioner for Human Rights which indicated the growing support for setting the minimum age for participation in hostilities at 18 among States, NGOs, United Nations bodies and mechanisms, the Secretary-General, and regional organisations.*

<sup>46</sup> The working group was established in 1994 pursuant to CHR res. 1994/91.

<sup>47</sup> E/CN.4/1999/73, para.18. As international law stands at the moment, Article 77(2) of Additional Protocol I to the Geneva Conventions of 1949 states '[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.' Protocol I applies in international armed conflicts and is not, therefore, relevant to the conflicts being discussed in the present chapter, or indeed, to the majority of conflicts today. Additional Protocol II provides authoritative standards in regard to internal conflict and states in Article 4(3) that '(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.'

In terms of international human rights law, Article 38 of the Convention on the Rights of the Child reads in part: '(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. (3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest'.

- the involvement of those under 15 in armed conflict.<sup>48</sup> On the issue of recruitment, several States were of the opinion that preventing recruitment of children would prevent their participation in hostilities and consequently called for a minimum age of 18 for both voluntary recruitment and conscription. Other States argued that the minimum age for voluntary recruitment should be set at 17 since that was already the practice in many countries.<sup>49</sup>

In the search for consensus, States in support of the 18 year limit appealed to those unable to accept the new limit not to prevent its adoption by other governments, emphasising in this regard the optional nature of the protocol and the absence of binding consequences for countries which chose not to ratify it.<sup>50</sup> Nonetheless, a significant minority of States refused to countenance an instrument containing the more advanced age limit. This, combined with the refusal of delegations in favour of the 18 year limit to accept an unsatisfactory solution for the sake of compromise - pointing out in this regard that the working group's *raison d'être* was to provide improved and higher international standards for protecting children<sup>51</sup> - resulted in deadlock. The working group decided, at its fourth session in February 1998, to adjourn early as it was evident that there was no possibility of reaching agreement on the proposed optional protocol within the allotted time-frame.<sup>52</sup> The group's fifth session in January 1999 was convened solely in order to consider the report of the chairman on the previous session as it was still believed that the working group would be unable to reach agreement on the draft optional protocol during that session and that more time and consultations were needed.<sup>53</sup> In 1999, the Commission invited the chairperson of the working group to continue broad informal consultations, with the aim of promoting an early agreement on the optional protocol and, if possible, to produce a report thereon by the end of 1999, including recommendations on how to finalise formal negotiations. In addition, it requested the working group to meet early in 2000 in order to make further progress with the aim of finalising its work before the tenth anniversary of the entry into force of the Convention and to report to the Commission in 2000.<sup>54</sup>

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<sup>48</sup> E/CN.4/1998/102, para.22.

<sup>49</sup> Ibid., paras.27-30.

<sup>50</sup> Ibid., paras.19, 20 and 24.

<sup>51</sup> Ibid., para.25.

<sup>52</sup> E/CN.4/1999/73, para.14.

<sup>53</sup> Ibid., para.23.

<sup>54</sup> CHR res. 1999/80.

During the summer of 1999 the prospects of compromise and consensus remained slim. Efforts to prohibit the forced and voluntary recruitment of under 18 year-olds in the ILO Worst Forms of Child Labour Convention, adopted in June 1999, were unsuccessful. Proposals for a total ban on using child combatants came from all African governments as well as those of Canada, Denmark, France, Italy, Mexico, Norway, Spain and Uruguay as well as trade unions. However, the United States, supported by the United Kingdom and the Netherlands, lobbied hard to prevent an outright prohibition of using child combatants. The position of the United States and others is based on domestic recruitment practices which allow 17 year-olds to enlist voluntarily for military service with parental permission. Whereas States were prepared to compromise in this instance, there was widespread sentiment within the Commission's working group that while it was searching for solutions that would have broadest possible support, it would not accept 'an unsatisfactory compromise, bearing in mind also the optional character of the protocol.'<sup>55</sup> Continued dead-lock looked inevitable.

However, the impasse was overcome at the working group's meeting in January 2000, during which States, in particular the United States (which has not ratified the Convention on the Rights of the Child), finally agreed to establish 18 years as the minimum age for participation in armed conflict. Although this was hailed by some as a 'landmark',<sup>56</sup> it was not without its concessions. Firstly, the protocol fails to establish 18 as the minimum age for voluntary recruitment into government armed forces. Rather, to accommodate those States that recruit children under 18 years, the Protocol provides in Article 3(1) that States Parties 'shall raise the minimum age for the voluntary recruitment of persons into their armed forces from that set out in Article 38, paragraph 3 of the Convention on the Rights of the Child [which stipulates the age of 15 years], taking account of the principles contained in that article [that priority be given to older children when recruiting among children who have attained the age of 15 years but not attained the age of 18 years] and recognising that under the Convention persons under the age of 18 years are entitled to special protection.' Paragraph 2 of that article then provides that each State Party 'shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment...' and which may be younger than 18 years. Secondly, the protocol

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<sup>55</sup> E/CN.4/1999/73, para. 19(c).

<sup>56</sup> Human Rights Watch, 'New Treaty Bans Children in Conflict - Pentagon in Major Policy Shift, Supports Agreement', Press Release (22 January 2000).

creates something of a double-standard by prohibiting all recruitment of children by non-governmental armed groups while allowing governmental forces to recruit volunteers under 18. As such, some have considered the protocol to be treading a fine line between a human rights treaty and anti-terrorism legislation.

### 1.1.3 Torture

No such breakthrough has yet been achieved with regard to the draft optional protocol to the Convention Against Torture. In March 1992, the Commission decided to establish an open-ended inter-sessional working group to elaborate a draft optional protocol which would provide for a system of scheduled and unscheduled visits by a Sub-Committee of the Committee Against Torture (CAT) to places of detention or other places where torture or cruel, inhuman, or degrading treatment or punishment may be occurring.<sup>57</sup> This would be an important step not least because it would apply both to acts of torture as well as to acts of cruel, inhuman or degrading treatment or punishment. At present, under Article 20 of the Convention, one or more of the members of CAT may be asked to undertake a confidential inquiry and report urgently to the Committee in cases in which it 'receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party'.<sup>58</sup> That it can only be activated in cases of torture necessitates a 'relatively liberal approach' from the Committee at the initial screening stage.<sup>59</sup> After seven years of negotiation, however, many of the key elements of the draft protocol remain to be agreed, including the very obligation to accept visits from a sub-committee without agreement or constraint.<sup>60</sup> That the completion of the draft protocol should founder essentially on the rocks of states' concern with their sovereignty and its perceived infringement through visits by such a sub-committee is rather ironic given the quite significant inroads that have been made by the Commission's special procedures, in particular its thematic special rapporteurs, representatives and independent experts,

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<sup>57</sup> See CHR dec. 1992/43.

<sup>58</sup> The procedure applies automatically to all States Parties unless at the time of ratification, and pursuant to Art.28(1), they specifically exclude its application.

<sup>59</sup> Byrnes, 'The Committee Against Torture', in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (1992) 531.

<sup>60</sup> See, for example, the *Report of the working group on the draft optional protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. E/CN.4/2001/67 (2001).

who have been able to visit a very wide range of countries.<sup>61</sup> Moreover, following the example set by Norway in 1999, by 2001 33 Governments had issued open invitations to any of the Commission's human rights mechanisms to visit their country at any time rather than requiring each mechanism individually and specifically to seek an invitation from the Government prior to a visit.<sup>62</sup>

## 1.2 Problems of Ratification and Entry Into Force

For some, the adoption of a treaty by consensus enhances the likelihood of its ratification. For example, Antonio Cassese observes that as consensus means that 'neither the overpowering (but only rhetorical) force of the many, nor the veto of the few powerful States, are made use of ... [this] ... increases the chances of resolutions being implemented and of conventions being ratified and observed by a large number of States'.<sup>63</sup> According to others, experience suggests there is no 'tangible relation' between the mode of decision-making and ratification.<sup>64</sup> This is likely to be the case in particular when the adoption of a text by consensus actually masks continued disagreement amongst States. And herein lies the second major drawback with the consensus technique, that even in the face of continued disagreement among States, those dissatisfied may for the sake of political expediency prefer not to raise formal objections and not press for a vote, thereby allowing the adoption of the relevant text by consensus. Consequently, a 'deceptive atmosphere of concord is developed' which stands in contrast to the 'delays or even

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<sup>61</sup> For example, during the year 2000 alone, the Representative of the Secretary-General on Internally Displaced Persons undertook missions to Burundi, East Timor, Armenia, Georgia and Angola; the Special Rapporteur on Freedom of Opinion and Expression visited Albania; the Special Rapporteur on the Independence of Judges and Lawyers visited Belarus, South Africa and the Slovak Republic; the Special Rapporteur on Torture visited Brazil and Azerbaijan; the Special Rapporteur on Violence Against Women visited Bangladesh, Nepal and India; the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography visited Morocco and the Russian Federation; the Special Rapporteur on Migrant Workers visited Canada; and the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions visited Nepal.

<sup>62</sup> The countries concerned are Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey and the United Kingdom. See further, Quaker United Nations Office, *Report on the 57<sup>th</sup> Session of the UN Commission on Human Rights* (2001).

<sup>63</sup> Cassese, note 18 above, at 196. See also Zemanek, note 24 above, at 878, and Danilenko, note 18 above, at 280. See also the United Nations, *Review of the Multilateral Treaty Making Process* (1985) (hereinafter *Review*), at 35: 'it has been suggested that the increasing tendency to formulate and even adopt treaties by consensus, which necessarily requires more extensive negotiations and more care in meeting the requirements of all potential participants, is more likely to result in generally acceptable instruments'.

<sup>64</sup> Zemanek, note 24 above, at 861.



resentment that become apparent as soon as the negotiating States are expected to finally express their consent to be bound by the treaty'. States may refrain from signing, and ratifications and accessions may be slow in coming and may be accompanied by 'numerous and weighty' reservations.<sup>65</sup>

### 1.2.1 Migrant Workers Convention

A rather striking example in this regard is the Migrant Workers Convention. While the lack of broad agreement among States during the negotiation of the treaty did not prevent its adoption it has since had an adverse effect on the ratification and entry into force of the Convention. Adopted in 1990, the Convention's entry into force is dependent on ratification by 20 States. At the time of writing, some 11 eleven years after its adoption, only 16 States have ratified the Convention. Importantly, none of the major countries of employment have ratified it and of these, Australia, Germany, the Gulf States, Japan and the United States are unlikely to do so on account of provisions explicitly granting rights to illegal migrants.<sup>66</sup> Throughout the drafting process both Germany and the United States opposed granting rights to migrants in an irregular situation. As such States are prevented, pursuant to Article 88 of the Convention, from excluding this group of migrants on ratification they are more likely to consider not ratifying the Convention at all.<sup>67</sup> This was made apparent by the German delegation who, in addition to a number of substantive reservations, had objections to a great many provisions adopted on second reading. The most important of these objections related to the fact that migrant workers in an irregular situation should become subjects of an international convention, that such a convention should accord them too many rights and that included within the scope of the draft convention were categories of persons who were not truly migrant workers. 'In light of all those objections, it seemed highly unlikely that ... Germany would ratify the Convention.'<sup>68</sup> And while the lack of sufficient ratifications is problematic in preventing the Convention's entry into force, that the major States of employment are unlikely to ratify the Convention is also problematic as it will serve to seriously undermine the treaty's *raison d'être*. As one commentator notes, the Convention 'will be considerably weakened if it is not

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<sup>65</sup> Simma, 'Consent: Strains in the Treaty System', in R. MacDonald and D. Johnston (eds), *The Structure and Process of International Law* (1983) 488.

<sup>66</sup> See R. Cholewinski, *Migrant Workers in International Human Rights Law* (1997) 202.

<sup>67</sup> Ibid.

<sup>68</sup> Quoted in Cholewinski, *ibid.*, at 203, note 285.

endorsed by some major countries of employment'.<sup>69</sup> Similarly, others have stated that 'if only sending countries ratify, the Convention would lose its practical meaning'.<sup>70</sup>

### 1.3 Reservations

Rather than not ratifying a given treaty a state may choose to ratify but in doing so may make a number of reservations or interpretative declarations through which it designates those parts of the treaty by which it does not wish to be bound.<sup>71</sup> Reservations are not necessarily a negative feature of the law of treaties. By allowing reservations, human rights treaties encourage participation by States that 'in general agree with the instrument but are unable or unwilling to accept a few of its provisions'.<sup>72</sup> Broader participation, albeit subject to reservations, at least enhances the protection provided by the treaty. Moreover, States may face immediate problems in reconciling human rights obligations with their domestic law

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<sup>69</sup> Ibid. Cholewinski continues, '[a]t present, its entry into force in the near future is rather wishful thinking'.

<sup>70</sup> Hune and Niessen, 'Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects', 12 *NQHR* (1994) 404.

<sup>71</sup> Article 2(1)(d) of the Vienna Convention on the Law of Treaties defines a reservation as a 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.' An interpretative declaration is held to constitute a reservation if its purports to modify or exclude the legal effect of a treaty. See *Belilos Case* (1988) ECHR, Ser. A, No. 132. See further, Merrills, 'The Belilos Case', 69 *BYBIL* (1988) 386, Bourguignon, 'The Belilos Case: New Light on Reservations to Multilateral Treaties', 29 *Virginia J. Int'l. L.* (1989) 347, and Marks, 'Reservations Unhinged: the Belilos Case before the European Court of Human Rights', 39 *ICLQ* (1990) 300. The same rule has been accepted by the Human Rights Committee in its General Comment No. 24(52), according to which if a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. General Comment No. 24 (52), HRI/GEN/1/Rev. 2 (1994), para.3. See further, Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)', 46 *ICLQ* (1997) 390.

<sup>72</sup> Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', 32 *CYBIL* (1994) 40. 'While States are normally willing to accept the compromises which are inevitable at multilateral conferences, there are occasionally issues on which they can accept no compromise: they are then faced with the choice of rejecting the treaty altogether, or of accepting all of it but the objectionable provision. It is not always wrong for them, either from their own point of view or that of the international community, to choose the latter.' R. Jennings and A. Watts, *Oppenheim's International Law* (1992) 1242-3. See also Rudolf Bindschedler: 'The aim of reservations is to give expression to the special interests of the contracting Parties and where possible to encourage the universality of the treaty'. He continues that '[c]onstitutional developments have also favoured reservations. In most States, treaties require the approval of their respective parliaments; these are only able to press their point of view after the conclusion of the treaty negotiations and the presentation of the entire text of the treaty. Parliamentary views can only then be given effect by means of reservation. The United States Senate, in particular, has frequently induced the President to

and legal and institutional traditions which will need to be overcome in time. As Simma observes, '[t]here is no essential incompatibility between a State's serious commitment to a human rights treaty and the practice of taking some of the treaty's substance back with the other hand by way of reservations.'<sup>73</sup>

On the downside, however, reservations 'frequently go well-beyond mere details, and may even make the ratification virtually meaningless.'<sup>74</sup> The Human Rights Committee has stated that the number, content and scope of reservations to the ICCPR, 'may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties.'<sup>75</sup> Although the Covenant has been the object of some sweeping reservations, it is not as seriously afflicted by reservations as a number of other human rights treaties,<sup>76</sup> in particular the Convention on Women<sup>77</sup> and the Convention on the Rights of the Child.<sup>78</sup> The Vienna Declaration and Programme of Action, adopted at the 1993 World Conference on Human Rights, encourages States to avoid resort to reservations and to limit the scope of those deemed necessary, in particular with regard to these two treaties.<sup>79</sup>

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enter reservations.' 'Treaties, Reservations', in R. Bernhardt (ed), *EPIL*, Instalment 7 (1981) 498.

<sup>73</sup> Simma, note 1 above, at 178.

<sup>74</sup> Schabas, note 72 above, at 41.

<sup>75</sup> General Comment No. 24(52).

<sup>76</sup> Redgwell, note 71 above, at 391.

<sup>77</sup> See Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women', 85 *AJIL* (1991) 281, and Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', 30 *Virginia J. Int'l L.* (1990) 643. The Committee for the Elimination of Discrimination Against Women, which oversees the implementation of the convention of that name, has issued a general recommendation that urges States Parties to reconsider their reservations and to consider the adoption of a procedure for determining the validity of reservations. Schabas, note 69 above, at 43.

<sup>78</sup> See Kuper, 'The Convention on the Rights of the Child', in *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1995).

<sup>79</sup> Vienna Declaration and Programme of Action, A/CONF.157/24 (1993), Part I, para.26, and Part II, paras.5, 39 (Equal Status and Human Rights of Women) and 46 (Rights of the Child). Para. 26 in Part I, reads: 'The World Conference on Human Rights welcomes the progress made in the codification of human rights instruments, which is a dynamic and evolving process, and urges the universal ratification of human rights treaties. All States are encouraged to accede to these international instruments; all States are *encouraged to avoid, as far as possible, the resort to reservations* [emphasis added].' A precursor to this paragraph, contained in a draft document that emanated from the 4<sup>th</sup> session of the Preparatory Committee for the World Conference in early May 1993 read, in regard to the clause on reservations: '[i]n accordance with international law, *any reservations and declarations on international treaties must be compatible with the object and purpose of the treaty* [A/CONF.157/PC/98 (1993), para.28. Emphasis added]'. Given the more direct wording of the latter clause and the implicit request that States review existing reservations, two States on the Drafting Committee of the World Conference (Iran and Malaysia), objected

There are situations in which reservations are not permissible. According to Article 19 of the Vienna Convention on the Law of Treaties, a reservation is permissible unless: (a) it is prohibited by the treaty, (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made, and (c) if the reservation is incompatible with the object and purpose of the treaty.<sup>80</sup> While conditions (a) and (b) are relatively straightforward, condition (c), the 'object and purpose test', has proved 'easier to state ... in general terms than to apply ... to concrete cases'.<sup>81</sup> In the absence of express provisions within the treaty in question and pursuant to Article 20 of the Vienna Convention, whether a reservation is incompatible with the object and purpose of the treaty is a matter upon which all the other Parties to the treaty can make their own judgement. They are entitled formally to object to another state's reservation but such an objection does not strike the reservation down, nor does it preclude the entry into force of the treaty between the objecting and reserving States unless that is clearly specified by the

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to the clause on reservations and suggested, along with the Chair of the Committee, its replacement with a paragraph drafted by the Secretary-General of the World Conference, namely that 'States are encouraged to accede to these international legal instruments, while avoiding as far as possible, the resort to reservations.' Despite the objections of Sweden, Italy, and Chile that it was important that States review their reservations, the Chair, supported also by the United Kingdom, India, and Rwanda, adopted the revised paragraph. For Anne Bayefsky, '[t]his was just one of many instances in which the Vienna Declaration was shaped by rejectionist governments, aided by Western complicity, and supported by a Chair unsympathetic to the principles at stake.' Bayefsky, 'Making the Human Rights Treaties Work', in L. Henkin and J.L. Hargrove (eds), *Human Rights: An Agenda for the Next Century* (1994) 257.

<sup>80</sup> Prior to the entry into force of the Vienna Convention, that reservations are not permissible in all circumstances, and in respect of all provisions of a treaty was made clear by the ICJ in its Advisory Opinion in 1951 on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Convention*. The Court held that reservation were permitted to the Convention, in spite of the absence of a provision to that affect, but would be acceptable only where they were compatible with the object and purpose of the Convention. ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), ICJ Reports (1951) 15.

<sup>81</sup> Simma, note 1 above, at 180. Simma continues by questioning the compatibility with the object and purpose of the ICCPR, of France's declaration that Art.27 of the ICCPR was not applicable in relation to France, in light of Art.2 of the French Constitution. Art. 27 provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language. According to Simma, Art.27 is the only multilateral treaty provision for the protection of minorities actually in force and, as such, it occupies an important place within the Covenant. But the French Constitution of 1958 optimistically states in its Art.2 that 'France is a republic, indivisible ...'. For Simma, the reservation is rather questionable in light of the object and purpose of the Covenant. He also considers the same to be true with regard to the numerous reservations made by Islamic States, in particular to the Convention on Women, in which these States 'made their intention to comply with treaty the provisions dependent on whether such compliance would or would not run counter to the Shari'ah.' Ibid. See further Clark and Cook, note 77 above.

objecting state. The legal effect of an objection is limited to modifying for the reserving state in its relations with that other party the provisions of the treaty to which the reservation relates.<sup>82</sup>

According to Rosalyn Higgins, the Vienna Convention's provisions on reservations 'operate unsatisfactorily in human rights treaties'.<sup>83</sup> For Higgins, '[i]n a normal treaty State A will lose some direct benefit under the treaty terms if State B, by reservation, announces it will not be performing a certain obligation. But in a human rights treaty it matters not very greatly to State A if State B decides not to guarantee to *its own citizens* certain rights envisaged under the treaty.'<sup>84</sup> Moreover, Higgins points out that an examination of state practice in regard to objections leads to the conclusion that States 'are not as rigorous about entering objections where, on the basis of the legal test - compatibility with the object and purpose of the treaty - they might reasonably be expected to do so.'<sup>85</sup> There is increasing concern in some quarters that the flexible reservations system under the Vienna Convention, designed to facilitate widespread participation in treaties, has achieved this goal 'at the expense of the integrity of treaties which are subject to sweeping reservations'.<sup>86</sup>

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<sup>82</sup> See L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (1995) 37-77 for an overview of the Vienna Convention system.

<sup>83</sup> Higgins, 'The United Nations: Still A Force for Peace', 52 *MLR* (1989) 11.

<sup>84</sup> *Ibid.*, at 11.

<sup>85</sup> *Ibid.*, at 11-12. See also T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 16-17: 'The system of *laissez-faire* which typifies the Vienna Convention's provisions on reservations, characterised by the absence of a third-party organ authorised to rule on the compatibility of reservations, establishes the reserving States, and other Parties to human rights treaties acting *ut singili*, as the final arbiters of compatibility. This system has failed to curb excessive reservations and to shield the integrity of human rights treaties. Dissatisfaction with this situation has triggered proposals to recognise the power of supervisory organs established under human rights treaties to rule on the compatibility of reservations made to such treaties [footnotes omitted].' The Committee's General Comment No. 24(52) also refers to this issue, stating that human rights treaties, and the Covenant in particular, 'are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic [Vienna] rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations.' General Comment No. 24(52), para.17. See also Kamminga who cites a number of cases in which States have objected to reservations of other States Parties to the ICCPR but notes that in none of the cases cited, did the objecting State 'indicate specifically that it considered a reservation so objectionable that it precluded the entry into force of the treaty between the objecting and reserving state'. On the contrary in fact, objecting States 'repeatedly indicated that this was not the result they wished to obtain, probably because they had decided that on the whole their interest in promoting wider adherence to the treaty was more important than their objections to the reservations in question.' Kamminga, note 6 above, at 137.

<sup>86</sup> Redgwell, note 71 above, at 392.

In response to this situation, the Human Rights Committee adopted General Comment No.24 which takes a 'bold step' towards the elaboration of a new separate reservations regime in respect of human rights treaties and which 'supposes very strict limits to the power of States to make reservations'.<sup>87</sup> In addition to listing various Covenant rights which the Committee considers may not be the subject of reservations,<sup>88</sup> the General Comment asserts that it is for the Committee to determine the compatibility of reservations with the object and purpose of the Covenant,<sup>89</sup> a responsibility not assumed by other treaty bodies such as the Committee on the Elimination of Discrimination Against Women<sup>90</sup> and the Committee on the Elimination of Racial Discrimination.<sup>91</sup> According to Catherine Redgwell, the General Comment has 'aroused the concern and, in certain quarters the ire, of States which have made widespread reservations to [the Covenant] and other treaties'.<sup>92</sup>

<sup>87</sup> Harris, 'The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction', in D.J. Harris and S. Joseph, *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 52, note 304, relying on para.8 of the General Comment.

<sup>88</sup> The General Comment deems reservations to the following as impermissible: provisions of the Covenant that represent customary international law, especially those which are considered peremptory norms. Reservations against the following would be incompatible with the object and purpose of the Covenant: Art.1, the right to self-determination, Art.2(1) non-discrimination, Art.4 and some of the non-derogable rights contained therein. Finally, reservations against those provisions which are essential for securing the rights contained in the Covenant, such as Art.2, domestic implementation, and Art.40, the role of the Committee, would also be considered incompatible with the object and purpose of the Covenant.

<sup>89</sup> On the grounds that the Committee finds the Vienna Convention's provisions on the role of state objections in relation to reservations, inappropriate to address the problem of reservations to human rights treaties, '[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because ... it is an inappropriate task for States Parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions'.

<sup>90</sup> Established pursuant to Art. 17 of the Convention on Women.

<sup>91</sup> Redgwell, note 71 above, at 392. With regard to CEDAW, according to the 1984 legal opinion of the Office of Legal Affairs of the United Nations Secretariat, the functions of the Committee 'do not appear to include a determination of the incompatibility of reservations, although reservations undoubtedly affect the application of the Convention and the Committee might have to comment thereon in its reports in this context'. Cited in Meron, note 82 above, at 22. And as concerns CERD, the United Nations secretariat has advised the Committee that even a unanimous decision by the Committee that a reservation is unacceptable would have no binding effect, and that the Committee was obliged to take into account the reservations made by States Parties. Cited in Meron, *ibid.*, at 22, note 56.

<sup>92</sup> Redgwell, note 71 above, at 393. Indeed, the Committee's adoption of the Comment elicited observations from the United Kingdom and United States Governments, the former observing, *inter alia*, that '[e]ven if it were the case (as the General Comment argues and the United Kingdom doubts...) that the law on reservations is inappropriate to address the problem of reservations to human rights treaties, this would not of itself give rise to a competence or power [to determine the compatibility of reservations with the object and purpose of the Covenant] in the Committee except to the extent provided for in the Covenant;

In the light of the practice and 'controversial' jurisprudence of human rights treaty bodies in regard to reservations, the ILC's special rapporteur on reservations to treaties, Alain Pellet, deemed it advisable and a matter of some urgency to examine the question of whether the rules applicable in respect of reservations to treaties were applicable to all treaties, particularly human rights treaties, in light of general international law principles.<sup>93</sup> In his second report, Pellet endorsed the appropriateness of the Vienna regime for all types of treaties<sup>94</sup> including human rights treaties.<sup>95</sup> Pellet also examined the role of treaty monitoring bodies in regard to the permissibility of reservations, concluding that human rights bodies could and should assess whether reservations were permissible when that was necessary for the exercise of their functions. However, they could not have more competence in that regard than was necessary for them to discharge their main responsibility.<sup>96</sup> In contrast to the position adopted by some human rights bodies, that once a reservation was deemed impermissible the reserving state continued to be bound by the treaty as a whole, Pellet argued that

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any new competence could only be created by amendment to the Covenant, and would then be exercisable on such terms as were laid down'; *Report of the Human Rights Committee, A/50/40 (1995), Annex VI, para.12(a).*

<sup>93</sup> *Report of the International Law Commission on the Work of the forty-eighth Session 6 May-26 July 1996, A/51/10 (1996), para.116.* Pellet recalled that the question had been posed with some urgency in the Sixth Committee of the General Assembly at its fiftieth session.

<sup>94</sup> This is entirely consistent with the ILC's position as set forth in adopting for its long-term programme of work the issue of reservations to treaties, indicating that it is 'aware of the need not to challenge the regime established in Articles 19 to 23 of the Vienna Convention on the Law of Treaties'. See *Report of the International Law Commission on the Work of its forty-fifth Session, A/48/10 (1993), at para.440.*

<sup>95</sup> In introducing the report to the ILC, Pellet observed that there were several reasons why the Vienna regime was appropriate in regard to human rights treaties: (a) the Vienna regime was designed to be applied *universally* without exception and that its point of departure - the Advisory Opinion of the ICJ on reservations to the Genocide Convention, concerned a quintessential human rights treaty; (b) since the Vienna Conventions, neither the practice of States *inter se*, nor judicial practice nor even the human rights treaty bodies had contested the applicability of the Vienna regime to human rights treaties.

However, Pellet qualified the preceding by considering that (a) it was not inconceivable that States Parties to human rights treaties would want to make exceptions or establish special regimes. For that purpose, it would be wise in future for States to stipulate expressly in human rights conventions whether and to what extent non-application of a provision constituted a breach of the 'object' of the conventions; (b) a 'fruitful dialogue' might be established between the reserving State and the objecting State, either spontaneously or on the basis of special provisions inserted in the treaty for that purpose (c) human rights monitoring bodies would continue to apply the Vienna regime in regard to reservations when no special rules existed. *Report of the International Law Commission on the Work of its forty-ninth Session 12 May-18 July 1997, A/52/10 (1997), at paras.76-77.*

With regard to (b), the likelihood of a 'fruitful dialogue' is minimal. In fact the reverse is more likely to apply. As summed up by Higgins: 'one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged.' Note 83 above, at 12.

<sup>96</sup> A/52/10 (1997), para.82.

the treaty was still a *consensual* instrument, drawing its strength from the *will* of States. The reservations made ... were 'consubstantial' with the States consent to be bound by the treaty... [T]he State *alone* could know the exact role of its reservation to its consent. It was neither possible nor desirable ... for *experts* - whose legitimacy drew on the treaty (hence on the will of States) - to replace elected Governments in deciding on the intentions of those Governments.<sup>97</sup>

According to Pellet, such decisions by treaty monitoring bodies 'which, like the Human Rights Committee were not given decision-making powers by the States Parties, would be contrary to general international law.'<sup>98</sup> He further objected to the 'excessive pretensions of the Human Rights Committee in seeking to act as *sole* judge of the permissibility of reservations.' Such a control on the permissibility of reservations

was not the monopoly of monitoring bodies. States through objections, could exercise another kind of control and such 'duality' of controls would make for still more effective operation of the treaty; moreover, objections by States were often not only a means of exerting significant 'pressure' but also a useful guide for the assessment of the permissibility of a reservation by the Committee itself.<sup>99</sup>

The practice of States in objecting to impermissible reservations gives little cause for optimism that 'state control' has been, or will in the future be, an effective means of policing the use of reservations. Even if objections are lodged in regard to a state's reservation to a treaty, political rather than legal considerations will likely be paramount in the minds of States.<sup>100</sup>

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<sup>97</sup> Ibid., para.83.

<sup>98</sup> Ibid., para.85.

<sup>99</sup> Ibid., para.87. While the Committee concedes that an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant, it also states that because of the special characteristics of the Covenant as a human rights treaty, 'it is open to question what effect objections have between States *inter se*.'

<sup>100</sup> On ratification of the ICCPR in June 1992, the United States made five reservations, five understandings and three declarations which, by 31 December 1993, had raised objections from only 11 States Parties and none of them within 12 months of communication of the reservations. According to Art.20(5) of the Vienna Convention, if a State has not indicated its objection to a reservation within 12 months of the notification of it, then it is considered to have accepted the reservation.

The United States use of reservations wherever there existed incompatibilities between the Covenant and domestic law was criticised by the Human Rights Committee in its comment on the United States initial report: The Committee 'regrets the extent of the [US]



Pellet's findings were largely endorsed by the ILC at its fifty-second session in 1997. According to the ILC, the Vienna regime's 'flexibility' makes it suitable to the requirements of all treaties, including human rights treaties. While acknowledging the competence of treaty bodies to comment upon and express recommendations on the admissibility of reservations by States in order to carry out the functions assigned to them, the ILC stressed that this competence does not exclude or otherwise affect the traditional modalities of control by contracting Parties with the provisions of the Vienna Conventions; and that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from powers given to them for their general role of monitoring. The ILC suggests providing specific clauses in normative multilateral treaties, in particular in human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to determine the admissibility of a reservation<sup>101</sup> - a rather futile suggestion given the attitude of States to self-policing of reservations in the first place.

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reservations, declarations and understandings... It believes that, taken together, they are intended to ensure that the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 ... which it believes to be incompatible with the object and purpose of the Covenant'. *Comments of the Human Rights Committee on the United States Report at its fifty-third Session, CCPR/C/79/Add.50*, para.14. Similarly, a Swedish objection to the reservation notes that '[r]eservations of this nature contribute to undermining the basis of international treaty law'. Cited by Redgwell, note 68 above, at 396. In spite of the objections of Sweden and ten other States, five of which (including Sweden) objected on the grounds that the United States reservations were incompatible with the object and purpose of the Covenant, none sought to preclude the entry into force of the Covenant between themselves and the United States. As Redgwell observes, '[c]oncern to ensure the participation of the United States in the Covenant has apparently overcome any concerns regarding the treaty's integrity'. *Ibid.*, at 406. See also Sherman, 'The US Death Penalty Reservation to the International Covenant on Civil and Political Rights - Exposing the Limitations of the Flexible System Governing Treaty Formation', 29 *Texas Int'l. L. J.* (1994) 71, quoting Hannum that 'most would agree that US participation in the ICCPR is a "good thing"'. See further, Stewart, 'US Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations', 14 *HRLJ* (1993) 77.

<sup>101</sup> A/52/10, at para.157 for the text of the preliminary conclusions. At its most recent, fiftieth, session held from 20 April-12 June and 27 July-14 August 1998, the ILC deferred further consideration of the issue of reservations to human rights treaties. In introducing his third report to the ILC, Pellet stated that he considered it premature to reopen the debate on the preliminary conclusions and that the ILC should wait for comments from States and human rights bodies which it had requested and until the consideration of the question of permissibility of reservations and reactions to them had been completed. See *Report of the International Law Commission on the work of its fiftieth session 20 April-12 June 1998, 27 July-14 August 1998, A/53/10* (1998), at para.486.

#### 1.4 Domestic Administrative Overload and Its Implications

A related issue to those of problems of ratification and entry into force and reservations which should also be considered to the extent to which it undermines the effectiveness of treaties is the reluctance of States, in the face of legislative and administrative overload at the national level, to consider amendments to treaties which would otherwise enhance the instruments utility. An example of this can be found in relation to the Convention on the Elimination of All Forms of Discrimination Against Women and the effective functioning its supervisory body, CEDAW (the Committee on the Elimination of Discrimination Against Women) which, as Mara Bustelo observes, 'has been seen both by commentators and by its own members as the "poor relation" of the treaty bodies'.<sup>102</sup> According to Bustelo, the distinction between CEDAW and the other treaty bodies that has the clearest impact on the work of the Committee is that, 'alone among human rights treaties', the Convention sets a specific limit on the Committee's meeting time of only two weeks per year.<sup>103</sup> Due to the rapid rate of ratification of the Convention, measures were sought to enable the Committee to expand the available meeting time, including the convening of a pre-sessional working group to review periodic reports and the allocation by the General Assembly on an exceptional basis of an extra week per annum. In May 1995, in an effort to avoid the need for such continuous exceptions, the States parties to the Convention adopted an amendment to the relevant article, providing that the Committee meet annually but that the duration of its meetings be determined by a meeting of States parties, subject to the approval of the General Assembly. The entry into force of the amendment is subject to its acceptance by a two thirds majority of the States parties.<sup>104</sup> However, in the face of governmental inertia or fatigue at the prospect of satisfying formal domestic requirements for treaty amendments, at the end of 2000 only 23 of the 166 States parties to the Convention had accepted the amendment,<sup>105</sup> prompting the General Assembly to urge States parties once again 'to take appropriate measures' so that acceptance

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<sup>102</sup> Bustelo, 'The Committee on the Elimination of Discrimination Against Women at the Crossroads', in P. Alston and J. Crawford, *The Future of UN Human Rights Treaty Monitoring* (2000) 81.

<sup>103</sup> *Ibid.*, at 82.

<sup>104</sup> See GA res. 50/202 (1995) and *Report of the Secretary-General to the General Assembly on the Convention on the Elimination of All Forms of Discrimination Against Women*, A/50/346 (1995).

<sup>105</sup> See *Report of the Committee on the Elimination of Discrimination against Women*, A/55/38 (2000). In 1996, the General Assembly approved a request from the Committee and supported by the States parties for additional meeting time so as to allow the Committee to

of the amendment by a two-thirds majority of States parties 'can be reached as soon as possible in order for the amendment to enter into force'.<sup>106</sup>

Similar problems have plagued efforts to increase the size of membership of the Committee on the Rights of the Child from ten to eighteen so as to assist it in responding effectively to the volume of work with which it is faced. Although the proposal, tabled by Costa Rica in December 1995 and involving an amendment of Article 43(3) of the Convention, was approved by the General Assembly that same month,<sup>107</sup> it also requires ratification by a two-thirds majority of States parties to the Convention. In its report to the General Assembly in 2000, the Committee noted that ratification of the amendment was still required by an additional 51 States parties.<sup>108</sup>

## **2. Structural and Procedural Weaknesses in Human Rights Treaty-Making**

In addition to the problem of obtaining consensus and the implications of this for the negotiation, adoption, ratification and entry into force of a particular treaty, the conventional wisdom that treaties are the way forward is also increasingly open to question when one considers the various structural and procedural weaknesses in human rights treaty-making. In the absence of adequate reforms, these weaknesses serve to limit if not reduce the utility of treaty-making as an effective and efficient means for responding to new human rights issues or for developing existing standards. Indeed, despite the proliferation of human rights treaty-making by the United Nations, concerns have been expressed in relation to several aspects of the process, such as the absence of a specific and defined treaty-making structure, the lack of adequate preparation and planning prior to undertaking a standard-setting exercise, normative inconsistency within and between instruments, lack of adequate expertise, and practical problems for state participation in drafting exercises. While such concerns were raised during the middle to late 1980s, they remain equally if not more valid today.

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hold two sessions annually, each of three weeks' duration, preceded by a pre-session working group, for an interim period starting in 1997. See GA res. 51/68 (1996).

<sup>106</sup> GA res. 55/70 (2001).

<sup>107</sup> GA res. 50/155 (1995).

<sup>108</sup> *Report of the Committee on the Rights of the Child*, A/55/41 (2000), para.1479. See also Lansdown, 'The Reporting Process Under the Convention on the Rights of the Child', in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 125.

## 2.1 Lack of Structure

Firstly, there is a distinct absence of any specific and defined structure to human rights treaty-making in the United Nations. This is the most obvious weakness, though it is one which effects United Nations treaty-making in general and not just in regard to human rights. This was apparent from remarks made to the General Assembly in 1976 by the Australian Foreign Minister in which he criticised the 'varied, chancy, frequently experimental and often inefficient' ways in which treaties were concluded by the United Nations.<sup>109</sup> Such comments led the General Assembly to request a review of the treaty-making process which, in regard to human rights, found that there exists no general pattern of treaty-making.<sup>110</sup> Others have been less diplomatic in their assessment of existing approaches to human rights treaty-making. As the United States delegate to the Third Committee of the General Assembly once observed:

much of the work in this area proceeds without planning, in a kind of haphazard manner, at a desultory pace and with the overlapping jurisdictions. We have working groups in the Third Committee, in the Commission on Human Rights, and in the Sub-Commission. It is difficult to keep track of the different drafts. There is a lack of continuity and expertise among the persons working on the drafts. It makes no sense, for example, for a body of this size to attempt to draft a convention from its inception. As it is, one often has to reinvent the wheel each time a working group reconvenes. The result is neither fast nor fruitful.<sup>111</sup>

While the lack of structure is itself a problem, it is more the problems that this gives rise to which have been the focus of critical comment.

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<sup>109</sup> Review, note 63 above, at 7.

<sup>110</sup> Ibid., at 19. It continues: 'The process may be initiated in a principal organ ... or in a subsidiary one; a diplomatic conference originally convened inside or outside the Organisation ... The initial draft may be prepared by the secretariat, an ad hoc working group of experts, a Government or a standing specialised organ ... These drafts are passed to the Council which may forward them on directly to the Assembly or may do so only after detailed consideration by one of its sessional Committees. The Assembly may consider such instruments at one or at as many as a dozen sessions, in the Third Committee alone, in both the Third and Sixth Committees... The entire process may take a period of time from a little over a year to one or more decades.'

## 2.2 Initiation and Planning

The lack of a defined and structured treaty-making process results in standard-setting exercises being initiated and undertaken without any proper planning,<sup>112</sup> the consequences of which were succinctly outlined in Alston's aforementioned 1989 report to the General Assembly on the effective implementation of international instruments on human rights. The Alston report noted that

elaborate draft instruments have been presented without any considered decision ever having been taken by any of the organs concerned that an instrument should be drafted. The draft thus acquires a life of its own despite the paucity of consultation that might have taken place as to the need for it, the form it should take, the most appropriate approach to be adopted, its relationship to existing standards and so on.<sup>113</sup>

To avoid such problems the report makes a number of suggestions such as that those proposing the adoption of new standards be encouraged to consider, as a matter of course, the criteria contained in General Assembly resolution 41/120 (1986) which, it will be recalled, invites Member States and United Nations bodies to keep in mind several guidelines in developing international instruments in the field of human rights, namely that such instruments be consistent with the existing body of international human rights law; be of fundamental character and derive from the inherent dignity and worth of the human person; be sufficiently precise to give rise to identifiable and practicable rights and obligations; provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and attract broad international support.<sup>114</sup>

The report also suggests that a pre-initiation study be undertaken, noting that in a significant number of international organisations the standard-setting process does not formally commence until a detailed preliminary feasibility study has been

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<sup>111</sup> Jerome J. Shestack, quoted in T. Meron, *Human Rights Law-Making in the United Nations* (1986) 271.

<sup>112</sup> Ramcharan, 'Standard-Setting: Future Perspectives', in B.G. Ramcharan (ed), *Human Rights, Thirty Years After the Universal Declaration* (1979) 101: 'The present system operates on too *ad hoc* a basis and, often, not enough objective groundwork is done before the standard-setting exercise is begun'.

<sup>113</sup> *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights. Note by the Secretary-General. A/44/668* (1989), para.163.

completed.<sup>115</sup> In addition, it is suggested that a specific decision be taken before the drafting of an instrument commences. Noting that the responsibility for formally initiating a standard-setting exercise in some international organisations is vested in a specific organ which acts by authorising a particular action,<sup>116</sup> the report observes that in the political organs of the United Nations 'the process is often initiated in a rather tentative way, to be reinforced or weakened at successive sessions as reports ... confirm or cast doubt on the desirability and feasibility of the enterprise.'<sup>117</sup> Consideration is given to the idea of charging a single United Nations organ with principal responsibility for formally initiating a standard-setting exercise which would 'ensure a more carefully coordinated approach and diminish the possibility of a variety of competing exercises being initiated in different contexts at the same time.'<sup>118</sup>

### 2.3 Coordination

The United Nations Charter contains several provisions concerning coordination of activities between the United Nations and its specialised agencies. In particular, Article 63 provides that the Economic and Social Council (ECOSOC) may enter into agreements with the specialised agencies defining the relationship between the agency concerned and the United Nations. Moreover, ECOSOC may coordinate the activities of the specialised agencies through means of consultation and

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<sup>114</sup> Ibid., at para.164. See further, note 42 above.

<sup>115</sup> A/44/668, para.164. The ILO, for example, requires in the context of the 'double-discussion procedure' the preparation of a preliminary report by the International Labour Office, setting out the law and practice in the different countries and other useful information, together with a questionnaire. The report highlights problems and indicates which of them could be resolved through the adoption of an instrument. A second report is drafted by the Office on the basis of the replies to the questionnaire, which ascertains what standards States would be prepared to accept and, thus, seeks to identify the obstacles to a generally acceptable instrument. In particular, the second report addresses the issue of the form of the instrument, i.e. convention, recommendation, or convention accompanied by a recommendation.

<sup>116</sup> In the ILO for example, the formal step is the placement of an appropriate item on the agenda of the International Labour Conference, a step taken for the most part by the Governing Body. See Meron, note 16 above, at 251-253 and the *Review*, note 63 above, at para.26.

<sup>117</sup> A/44/668, para.166, quoting the *Review*, at para.26.

<sup>118</sup> Ibid., at para.167. The report suggests that such a role may be ascribed to either the General Assembly or the Commission. However, in regard to the former, it observes that when a similar proposal was canvassed in the past the response from States was predominantly negative. The terms of reference of the Commission, on the other hand, were expanded by the Council in resolution 1979/36 so as to entrust it with the function of assisting the Council to coordinate activities concerning human rights in the United Nations system. Also, GA res. 41/120 reaffirmed the important role of the Commission, among other appropriate United Nations bodies, in the development of human rights instruments.

recommendations. This latter 'power of recommendation' has never been used by ECOSOC for the purpose of obtaining any systematic coordination of legislative activities with the agencies<sup>119</sup> - by no means an insignificant problem given the overlap between the certain provisions of the Charter and some of broad constitutional provisions of the specialised agencies concerned with human rights, such as the ILO, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation (WHO).

A prominent example of the absence of legislative coordination between the United Nations and the specialised agencies was the drafting of the Migrant Workers Convention by the General Assembly. The ILO Governing Body 'pointed out that the ILO's constitutional mandate had from the start included the protection of the interests of workers when employed in countries other than their own' and suggested that, 'with a view to concentration of resources and the avoidance of duplication or conflict, it would be preferable for standard-setting for the protection migrant workers to continue to be entrusted to the ILO, as the agency with specific constitutional responsibility for this question, in collaboration, where appropriate, with other organisations concerned'.<sup>120</sup> Despite such calls, the drafting process proceeded in the General Assembly and was undertaken by 'generalists' rather than 'experts',<sup>121</sup> a point to which we shall return.

It should be noted that problems of coordination may stem from political considerations. Although universal organisations have, more or less, the same membership, this does not guarantee coordination between national delegations which may take inconsistent positions in various organisations for reasons of national policy or national interests of a political, economic, or other nature.<sup>122</sup> Thus, while the ILO Governing Body may emphasise its constitutional mandate in relation to migrant workers, the political interests of a significant number of States dictated that the convention would be drafted in the General Assembly, rather than within the ILO.<sup>123</sup>

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<sup>119</sup> Meron, note 16 above, at 259.

<sup>120</sup> ILO Doc.GB.212/IO/1/8 (1980), para.17, cited in Hasenau, 'Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and their Families in Relation to ILO in Standards on Migrant Workers', 28 *Int'l. Migration* (1990) 134.

<sup>121</sup> Meron, note 111 above, at 261.

<sup>122</sup> *Ibid.*, at 262.

<sup>123</sup> As Böhning, 'The ILO and the New UN Convention on Migrant Workers: The Past and Future', 25 *Int'l Migration Rev.* (1991) 700, observes: 'Developing countries wanted to avoid

Problems of coordination also occur within the United Nations itself, with '[i]nter-related or similar projects ... being carried out along separate tracks in a compartmentalised fashion'.<sup>124</sup> During the 1980s, for example, work in respect of instruments on the independence of the judiciary and of lawyers was undertaken within the Sub-Commission, the United Nations Centre for Social Development and Humanitarian Affairs and the Committee on Crime Prevention and Control.<sup>125</sup>

More recently, work in respect of trafficking in women and children was being undertaken by the Commission's working group on a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>126</sup> and by the intergovernmental *ad hoc* committee of the Commission on Crime Prevention and Criminal Justice, established by the General Assembly for the purpose of drafting an international convention against transnational organised crime, including a draft protocol to prevent, suppress and punish trafficking in women and children.<sup>127</sup> While coordination is desirable in regard to standard-setting *per se*, it was clearly imperative in the current context

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the ILO at all costs... First, the ILO was felt to be bound by its recent [ILO Migrant Workers (Supplementary Provisions)] Convention No. 143, which threatened to cut off employment opportunities and hard foreign exchange remittances in North America and Western Europe from illegally employed migrants of developing countries. Second, unlike the UN, the ILO was not subject to the 'automatic majority' of Third World versus First World countries; i.e. developing countries could more easily achieve their aims in the UN than the ILO. Third, the ILO was a symbol of trade unions that were independent of governments, a system not in fashion in many African countries and Mexico, for example.'

<sup>124</sup> van Boven, 'The Future Codification of Human Rights: Status of Deliberations - A Critical Analysis', 10 *HRLJ* (1989) 7-8.

<sup>125</sup> In 1980, the Council authorised the Sub-Commission to entrust a special rapporteur with the preparation of report on the independence and impartiality of the judiciary, jurors, assessors and the independence of lawyers, which, in 1988, led to the submission of a draft declaration on the subject to the Commission. In the meantime, the United Nations Centre for Social Development and Humanitarian Affairs and the Committee on Crime Prevention and Control worked concurrently on 'Basic Principles on the Independence of the Judiciary', adopted by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders (1985), and on Draft Procedures for the Effective Implementation of the aforementioned Basic Principles and the Draft Basic Principles on the Role of Lawyers. See *Annotations to the provisional agenda of the fortieth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*. E/CN.4/Sub.2/1988/Add.1 (1988), paras.144-152, cited in van Boven, *ibid.*, at 8.

<sup>126</sup> See GA res. 48/156 (1993), requesting the Commission to consider the creation of a working group to study, as a matter of priority and in close contact with the Special Rapporteur on the sale of children, child prostitution and child pornography, the elaboration of guidelines for a possible draft convention on the issues related to the sale of children, child prostitution and child pornography. The initial report of the working group, established by the Commission in resolution 1994/90, is contained in E/CN.4/1995/95 (1995).

<sup>127</sup> GA res. 53/111 (1999). See further the report of the Secretary-General on the elaboration of a United Nations convention against transnational and organised crime in E/CN.15/1999/5 (1999).



given the two quite different perspectives from which the trafficking issue was being approached, i.e., from the perspective of human rights law and concern for the promotion and protection of the rights of children in the face of the increase in global incidents related to the sale of children, child prostitution and child pornography;<sup>128</sup> and from the perspective of international criminal law and concern at combating the significant and increasing activities of transnational criminal organisations and others who profit from international trafficking in persons.<sup>129</sup>

The Commission on Human Rights at its fifty-fifth session, adopted resolution 1999/40 on traffic in women and girls, in which it encouraged Governments in elaborating the draft convention against organised transnational crime, including the draft protocol on trafficking in women and children, to include a human rights perspective and to take into account work being done in other international forums, particularly the Commission's working group. The Commission's resolution came at an opportune moment. Firstly, it drew attention to the fact that two potentially overlapping and concurrent drafting exercises are being undertaken within the United Nations. The resolutions of both ECOSOC and the General Assembly on the establishment of the *ad hoc* committee make no mention of the existence of the Commission's working group let alone the need to take its activities into account.<sup>130</sup> Secondly, while the *ad hoc* committee's revised draft protocol includes a human rights perspective,<sup>131</sup> the extent to which the *ad hoc* committee is giving due regard to the activities of the Commission's working group was questionable. Concerns about the potential for overlap between the work of the two groups were raised at the *ad hoc* committee's informal preparatory meeting during August-September 1998. The concerns were, however, dismissed on the grounds that the *ad hoc* committee was approaching the matter from the perspective of international criminal law and cooperation in criminal matters and that therefore, 'the likelihood of overlap

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<sup>128</sup> GA res. 48/156 (1993).

<sup>129</sup> See *Report of the informal preparatory meeting of the open-ended intergovernmental ad hoc committee on the elaboration of a comprehensive international convention against organised transnational crime, held at Buenos Aires from 31 August to 4 September 1998*, A/AC.254/3 (1998), para.10, and also the preamble to the revised draft protocol to prevent, suppress and punish trafficking in women and children, A/AC.254/4/Add.3/Rev.1 (1999).

<sup>130</sup> See ECOSOC res. 1998/20 and GA res. 53/111.

<sup>131</sup> The revised draft protocol, as submitted by the United States and Argentina, contains a number of references to human rights. For example, the preamble speaks of the need to protect the victims of trafficking, including by protecting their internationally recognised human rights, and among the purposes of the protocol draft Art.1 refers to the responsibility of States to ensure that victims of trafficking receive proper protection and the provision of appropriate legal, medical, psychological and financial assistance.

was limited'.<sup>132</sup> Though it may be limited it does not dispose of the requirement to ensure normative consistency between the two instruments in instances where this may be necessary and which may not be immediately apparent during the initial stages of the drafting process. In something of a missed opportunity, Mary Robinson, the High Commissioner for Human Rights, addressed the fourth session of the *ad hoc* committee in July 1999. While the High Commissioner's statement underscored the need for the *ad hoc* committee 'to integrate human rights into its analysis of the trafficking problem and in the development of an effective international legislative response', it failed to remind the *ad hoc* committee of the existence of a similar standard-setting exercise in the Commission.<sup>133</sup>

Although such situations and the inevitable waste of financial and other resources, not to mention potential for normative problems, may be less likely to occur in the future given the increasing emphasis on implementation over standard-setting, it is important recognise that just as there remains an on-going need for new or more advanced standards, there remains a need for coordination.

## 2.4 Normative Inconsistency

Consistency between the normative provisions of the multitude of human rights treaties and other instruments is a fundamental requirement if the credibility, clarity and scope of protection afforded by existing instruments, are to be maintained and not undermined. The Secretary-General's review of the treaty-making process drew attention to the importance of ensuring that conflicts do not arise between existing instruments and those under preparation and to the role of the Secretariat in this regard:

As the body of international law created by multilateral treaties increases, greater and greater problems arise about possible conflict between treaties already in force, whether on a world-wide or regional or otherwise restricted basis, and new proposed instruments. Naturally identification of the existing instruments that bear on the subject matter of a proposal is always part of the research performed at

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<sup>132</sup> A/AC.254/3, para.10.

<sup>133</sup> 'Message from the High Commissioner for Human Rights, Mary Robinson to the Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organised Crime, Fourth Session, Vienna, 7 July 1999.' Available at [www.unhchr.ch](http://www.unhchr.ch)

some stage of the treaty-making process by the secretariat of the organisation concerned.<sup>134</sup>

With regard to the United Nations, the Secretary-General's review notes that practically all organs that formulate treaties, whether expert or representative, at one or more stages submit the text for consideration by a drafting committee which often includes secretariat experts, though even if this is not so, 'secretariat members often play an important role in servicing committees consisting of governmental or expert members.'<sup>135</sup> Nevertheless, normative *inconsistency* has been an unfortunate feature of human rights standard-setting, occurring both within and between instruments. Regarding the former, Meron observes that it is not unusual to find that 'provisions drafted during a later session of the law-making organ conflict with those drafted earlier, and that no attempt is made subsequently to revise the conflicting texts.'<sup>136</sup>

As for inconsistencies between instruments, given the vast array of international human rights instruments, both on the universal and regional levels, and the range of areas and issues they address, the potential for conflict and inconsistency is virtually unlimited. Normative differences may, for example, occur between two universal instruments dealing with the same or other subject-matters; between a universal and a regional instrument; between instruments protecting the same category of persons, especially when one instrument is broadly oriented and general and the other deals with a specific subject matter which may well be within the competence of a specialised agency or may embody protective standards of social legislation; and between an instrument protecting a particular category of persons and an instrument protecting a particular right or freedom or dealing with particular subjects or problems.<sup>137</sup>

Some of these are particularly marked in the case of the Migrant Workers Convention which contains provisions inconsistent with instruments adopted by both

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<sup>134</sup> Review, note 63 above, at 32.

<sup>135</sup> Ibid., at 29.

<sup>136</sup> Meron, note 111 above, at 270. For examples see Cassese, 'Self-Determination of Peoples', and Ramcharan, 'Equality and Non-Discrimination', in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 103-5 and 256-7.

<sup>137</sup> Meron, note 111 above, at 150; and Tistounet, 'The Problem of Overlapping Among Different Treaty Bodies', in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 384-388.

the United Nations and the ILO.<sup>138</sup> Also, States Parties to the ICCPR and to one of the regional instruments such as the European or American Conventions on Human Rights are bound by significantly different normative provisions;<sup>139</sup> and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief may contravene norms stated in the Convention on Women.<sup>140</sup>

To avoid such situations, the Alston report suggests that the Secretariat provide, as a matter of course, a 'technical review' of the type undertaken in regard to the Convention on the Rights of the Child which sought to identify overlap and repetition between and within draft articles; checked for consistency in the text, including use of key terms and use of gender neutral language, and between different language versions; compared the standards established with those in other widely accepted

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<sup>138</sup> See Hasenau, note 120 above. Concerning trade union rights, for example, Hasenau observes that while Art.26(1) of the Migrant Workers Convention provides for migrant workers in both regular and irregular situations to participate in, to join, and to seek aid and assistance from trade unions, Art. 40 provides for that only those migrant workers who are documented or in a regular situation can form associations or trade unions. As such, Art.40 falls short of the guarantees in Art.22(1) ICCPR and Art.8(1) ICESCR providing for freedom of association and in particular the right of all individuals within the territory of the State and subject to its jurisdiction to form trade unions. For Hasenau, while the actual uncertainty of the situation of non-documented or irregular migrant workers might allow them to make effective use only of the right to receive assistance from trade unions, it is nonetheless a 'step-back' in the sense that the Convention is designed to provide a comprehensive catalogue of the rights of all migrant workers, both regular and irregular, which it does in the preceding articles in part III of the Convention generally by reproducing the wording of the International Covenants. This shortfall is considered to assume particular weight given that trade union rights are 'an essential means for workers to defend their interests'. For the same reasoning, Art.26 is also inconsistent with Art.2 of ILO Convention No.87 concerning freedom of association and protection of the right to organise. Overall, Hasenau states that these 'deviations from the International Covenants and the ILO Convention No.87 have to be viewed as a considerable depreciation of trade union rights of migrant workers in an irregular situation.' At 138-9.

<sup>139</sup> For example, under the American Convention the right to life, as provided for in Art.4, can be interpreted as to affect matters such as abortion, whereas the same right as provided for in Art.6 of the ICCPR has no impact on abortion.

<sup>140</sup> The inconsistency between the two instruments stems from the following. The saving clause of the Convention in Art.23 does not exclude the provisions of the Declaration from the reach of the Convention, not only because the Declaration is not an 'international convention, treaty or agreement in force' for a particular state, but because it does not state norms 'more conducive to the achievement of equality between men and women'. Likewise, the Declaration's saving clause in Art.8 does not exclude the Convention from the reach of the provisions of the Declaration. Only the Universal Declaration and the two International Covenants, are so excluded. As Meron observes, due to the failure of the drafters to provide deterrents to conflict between these two instruments, 'the potential is great for unregulated conflicts between religious freedom and other norms, such as women's equality' - especially given the intensity of religious belief, the conviction of the supremacy of religious law over secular law which prevails in some countries, and the far-reaching impact of religion on social, cultural, and political life. Given the force of religion in many societies, 'it is entirely possible that, in the future, States Parties to the [Women's Convention] will invoke principles embodied in the Declaration as grounds for evading obligations under the Convention which are incompatible with specific religious practices.' *Ibid.*, at 154-5.

human rights instruments; and made textual and editorial suggestions and recommendations as to how any overlaps or inconsistencies identified might be corrected in the second reading, including through the consolidation and relocation of articles.<sup>141</sup> The Vienna Declaration and Programme of Action called upon human rights bodies, when considering the elaboration of new international standards, to request the Secretariat to carry out technical reviews of proposed new instruments.<sup>142</sup> However, it should be noted that while the technical review of the Convention on the Rights of the Child was generally considered to produce good results, the technical review of the Migrant Workers Convention was far less satisfactory with the Secretariat unable to prepare as thorough a review as it might have owing to limited resources.<sup>143</sup> In addition, the review of the Convention on the Rights of the Child benefited from the lead role taken by the United Nations Children's Fund in the process whereas there was no similar institutional drive behind the review of the Migrant Workers Convention.

Other means for avoiding or reducing normative conflicts have also been advanced. The ILO has suggested that whenever possible, those organisations which had previously left a matter to other organisations should desist from any new legislative action. If the existing standards are unsatisfactory, or contain gaps, the organisations which adopted the original instrument should undertake its revision.<sup>144</sup> Another suggested technique is the use of a saving clause which would provide that the obligations arising from an earlier instrument or instruments would not be affected by the adoption of the new instrument.<sup>145</sup> For Meron, the most effective

<sup>141</sup> A/44/668, para.171. See further E/CN.4/1988/28 (1988), paras.237-248.

<sup>142</sup> A/CONF.157/23 (1993), Chap. II, Part A, para.6.

<sup>143</sup> See *Report of the open-ended working group on the drafting of an International Convention on the Rights of All Migrant Workers Members of Their Families*. A/C.3/45/1 (1990), cited in L. LeBlanc, *The Convention on the Rights of the Child* (1995) 13.

<sup>144</sup> See Meron, note 111 above, at 202. This points to another issue which can have its impact on the treaty making process – safeguarding of institutional turf. As Meron notes, 'specialised agencies have increasingly complained that the General Assembly "is legislating more and more, and in ever greater detail" in fields that are "clearly the responsibility" of one of the specialised agencies, which may lead to "confusion, overlapping of activities and even conflicting decisions".' Ibid., at 260 (footnotes omitted). As Böhning remarks, for example, the drafting of the Migrant Workers Convention in the Third Committee of the General Assembly was perceived by the ILO Secretariat and members of the Governing Body as 'yet another attempt by the United Nations to pull the carpet out from under the feet of this specialised agency'. Böhning, note 123 above, at 702. See generally, Samson, 'Human Rights Coordination within the UN System', in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (1992) 620ff.

<sup>145</sup> Meron, note 111 above, at 203. As Meron observes further, at 207-211, saving clauses are not without their problems. Firstly, some clauses are not uniform and aim at saving only the more advantageous provisions of other instruments. Thus Art.23 of the Women's Convention provides that nothing in the Convention shall affect for a State Party any

means of avoiding conflict and inconsistency is legislative restraint, i.e. either abstaining from further legislating on a subject already covered by an existing instrument, or formulating norms which are 'parallel, similar, and complimentary to existing provisions.'<sup>146</sup> This latter option of course requires 'awareness and responsibility on the part of the law-making bodies and research leading to the identification of the existing instruments dealing with the subject matter of a new law-making proposal.'<sup>147</sup>

## 2.5 Expertise

At the core of these various solutions to avoiding normative inconsistency is the availability of adequate expert advice, be it from the Secretariat or another appropriate source, which could ensure that draft provisions that are actually, or potentially, in conflict with existing standards are brought to the attention of the drafting body.<sup>148</sup> Important though such expertise is, it is a requirement which is not always present in human rights treaty-making. For example, the drafting of a treaty may be entrusted to an open-ended working group of the Commission, composed of representatives of Member States of the Commission and, as observers, other interested States, NGOs, and the specialised agencies. While the participation of the latter two may aid the necessary expertise, only Member States of the Commission have voting rights and, therefore, the final say - one which may be predicated on political, rather than expert, considerations. The Commission is, after all, a political organ consisting of States' representatives. In fact, since 1946 and the Council's rejection of proposals that the Commission consist of independent experts, the Commission has 'never purported to be other than a political body in which decisions are taken on political lines, albeit in the light of appropriate international legal standards and the desirability of consistency and fairness in decision-making'.<sup>149</sup>

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provisions in any other international convention, treaty, or agreement 'that are more conducive to the achievement of equality between men and women'. Whether a particular provision is more conducive to the achievement of equality may not be easy to determine. Moreover, organs established under two human rights instruments may well arrive at different and conflicting conclusions. Secondly, an ambiguous saving clause may generate difficult questions of interpretation and may not effectively prevent conflicts. Thirdly, certain saving clauses refer only to specific instruments, leaving open the possibility of unregulated conflict with other instruments - see note 140 above.

<sup>146</sup> Ibid., at 203.

<sup>147</sup> Ibid.

<sup>148</sup> A/44/668, para.171.

<sup>149</sup> Alston, 'The Commission on Human Rights', in P. Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 193. To those who wanted the Commission to

Alternatively, responsibility for drafting a treaty may be given to the Sub-Commission on the Promotion and Protection of Human Rights. Although its members are elected by the Commission as 'individual experts', the quality of expertise of its members is uneven and questions have been raised over its growing politicisation.<sup>150</sup> As Asbjørn Eide has observed, individuals with 'little or no expertise in human rights, beyond diplomatic training, have been nominated and elected, and a number of experts have not sought to conceal that they see themselves essentially as governmental representatives'.<sup>151</sup> The Commission has underlined the importance of independence of members of the Sub-Commission, stressing that members and their alternates be 'independent experts not subject to government instruction in the performance of their functions as members of the Sub-Commission'.<sup>152</sup> At present no criteria have been formally laid down for membership of the Sub-Commission and qualifications are not checked at any

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consist of persons serving in their individual capacity and not as governmental representatives, a small concession was made by providing that 'with a view to securing a balanced representation in the various fields covered by the Commission, the Secretary-General shall consult with governments so selected before the representatives are finally nominated by these governments and confirmed by the Council'. No case of the Secretary-General objecting to the qualification of a representative, or of the Council refusing to confirm the individual, has been known. See Schwelb and Alston, 'The Principal Institutions and other Bodies Founded under the Charter', in K. Vasak and P. Alston (eds), *The International Dimensions of Human Rights* (1982) 243-4.

Elsewhere, Alston remarks however, that 'it would be wrong to assume that the Commission has not managed to build up considerable expertise and even distinction within its ranks. Over the years a number of individuals have succeeded in exercising leadership roles by virtue of their personal qualities rather than their diplomatic clout. Several Western European States have also developed a general policy of appointing individual experts (often academics) to head their delegations, thus seeking to emphasise expertise over diplomacy'. At 194.

<sup>150</sup> Meron, note 111 above, at 276. In 1952 the Sub-Commission sought to develop a 'study programme' with the aim of presenting recommendations or concrete measures 'for hastening the eradication of discrimination' and which was criticised by the UK representative at the Commission on Human Rights as consisting of a 'purely expert approach', interpreted by Eide to mean that 'political realities were not properly taken into account'. Eide, 'The Sub-Commission for Prevention of Discrimination and Protection of Minorities', in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (1992) 217.

<sup>151</sup> Eide, note 150 above, at 254. Tom Farer and Felice Gaer observe that 'in part because they must be nominated and re-nominated by States (in practice almost invariably their own state), many [Sub-Commission members] are no less instruments of their respective governments than their counterparts on the parent body.' Farer and Gaer, 'The UN and Human Rights', in B. Kingsbury and A. Roberts (eds), *United Nations, Divided World* (1993) 262.

<sup>152</sup> See CHR res. 1985/28, and reaffirmed in CHR res. 1999/81. The Commission and the Council have sought ways to strengthen the independence of expert members of the Sub-Commission, permitting it to utilise a secret ballot when considering votes on situations involving violations of human rights in particular countries. 'This action was triggered by increased recognition that the independent experts on the Commission were being subjected to government pressures - and often instructions - about their voting on country-specific resolutions'. Farer and Gaer, *ibid.*, at 262, note 47.

stage. However, the Commission, at its fifty-fifth session, invited the Sub-Commission to improve on its methods of work by proposing measures to enhance the independence and expertise of its membership.<sup>153</sup>

As for the General Assembly, reference was earlier made to the drafting of the Migrant Workers Convention by 'generalists' rather than 'experts' which may account for a number of the inconsistencies in the Convention. Quinn, for example, noting how the initial draft contained many provisions which were inconsistent with existing international standards and revealed inadequate attention to a wealth of technical issues, observes that only a limited number of delegates involved in the negotiations had expertise.<sup>154</sup> That said, Meron states that it should not be assumed that 'a generalist governmental representative is necessarily incompetent.' Talented academics, parliamentarians, lawyers, members of women's organisations, among others, have served on the Third Committee and other United Nations organs composed of government representatives. However, 'this is not enough to guarantee the necessary "legislative" skill when the initial draft is not prepared by experts'.<sup>155</sup> An additional safeguard in this respect is, as suggested above, technical support from the Secretariat. With regard to the Migrant Workers Convention however, Quinn notes that inadequate technical support for the drafting process was provided by the Secretariat in the initial stages, though it did increase as the negotiations entered the final stages.<sup>156</sup> In connection with this, the same author observes that given the location of the substantive Secretariat servicing the human rights programme in Geneva, its capacity to provide technical support to human rights issues dealt with in New York has been very limited, and has posed 'particular problems for standard-setting exercises undertaken by the Assembly where technical advice is so important.'<sup>157</sup>

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<sup>153</sup> CHR res. 1999/81.

<sup>154</sup> Quinn, 'The General Assembly into the 1990s', in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (1992) 66.

<sup>155</sup> Meron, note 111 above, at 277-8.

<sup>156</sup> Quinn, note 154 above, at 66. See also Lönnroth, 'The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation', 25 *Int'l Migration Rev.* (1991) 725.

<sup>157</sup> Quinn, note 154 above, at 62.



## 2.6 Practical Problems

A further criticism of human rights treaty-making, levelled not so much against the exercise itself as its frequent or continuous use, is that the international community's overall level of standard-setting has been considered excessive and to the point that 'there may be grounds for concluding that many States are beginning to suffer what may be termed international norm fatigue'.<sup>158</sup> While the pace of international standard-setting may have decelerated in recent years it is still a necessary fact of international life and 'excessive' standard-setting is not without its problems. Many States cannot afford to send specialised delegations to observe or participate in all of the drafting exercises being undertaken at any one time. This is a particular, though by no means exclusive, problem for developing countries.<sup>159</sup> They may also lack the necessary expertise. This can result in an enormous workload for a state's diplomatic representatives in New York and Geneva in terms of the preparatory work required, participation in intensive drafting and negotiation sessions, and reporting to their capitals. Some countries may be unable to follow drafting activities as closely as they wish, so that the standards drawn up do not adequately reflect the views of all concerned States which can have negative ramifications for the treaty's ratification and entry into force. Also, the proliferation of standards being drafted may place too great a burden on the legal resources of domestic organs.<sup>160</sup>

At the United Nations level, 'excessive' standard-setting has obvious repercussions in terms of the demand placed on the Secretariat which may be unable to provide enough staff with the appropriate expertise in order to service the various drafting bodies.<sup>161</sup> This has further repercussions in terms of ensuring consistency with existing standards which is aggravated by the increasing number of standards. An additional problem is that given the financial restraints on the United Nations and the growing demands on the already limited meeting time of policy-making organs such as the Commission, standard-setting exercises result in a proportional reduction of the resources available both to the United Nations and the Member

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<sup>158</sup> A/44/668, para.141. See also Schachter, 'The Nature and Progress of Legal Development in International Society', in R. MacDonald and D. Johnston (eds), *The Structure and Process of International Law* (1983) 785.

<sup>159</sup> A/44/668, para.147. See also Szasz, 'Improving the International Legislative Process', 9 *Georgia J. Int'l. & Comp. L.* (1979) 525.

<sup>160</sup> A/44/668, paras.146-148. See for example, Duffy, 'Practical Problems of Giving Effect to Treaty Obligations - The Cost of Consent', 12 *AYIL* (1982) 16.

<sup>161</sup> A/44/668, para.149. See also Szasz, note 159 above, at 525.

States for other aspects of human rights promotion and protection.<sup>162</sup> Some have argued that heavy and competing demands on the United Nations policy-making organs 'tends to cause stagnation in the work of these organs.'<sup>163</sup>

## **2.7 Proposals and Prospects for Reform**

The various structural and procedural weaknesses identified above, serve to undermine the utility of treaty-making as a response to new and emerging human rights issues. This situation could be remedied to some extent by reforming the treaty-making process, a number of options for which have been noted. The problems described in relation to planning and initiation could be alleviated through the application of the guidelines contained in General Assembly resolution 41/120, the undertaking of a pre-initiation study, the formal initiation of a standard-setting exercise and charging a single United Nations organ with principal responsibility for this. As regards normative inconsistency, the undertaking by the Secretariat of a 'technical review' has been suggested though the utility of this exercise is dependent on sufficient resources. Maintaining an adequate level of expertise in the process could be assured through providing the Secretariat with adequate resources to allow it to undertake a more expert-oriented role in the drafting of human rights treaties. Depoliticisation of the Sub-Commission and the introduction of measures to ensure the expertise of its members would also seem appropriate.

More recent proposals for reforming United Nations standard-setting techniques were outlined in the 1999 report of the Bureau of the fifty-fourth session of the Commission on Human Rights on the rationalisation of the work of the Commission.<sup>164</sup> The report addresses some of the problems noted earlier in regard to the need to depoliticise the Sub-Commission and ensure the expertise of its members. Recommendation 12 proposes 'sharpening' the Sub-Commission's role as an 'independent expert body', recommending in this regard that the membership of the Sub-Commission be reduced to 15 members, nominated by the Chair of the Commission in consultation with the Bureau, on 'the basis of their expert

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<sup>162</sup> A/44/668, para.149. See also Van Bueren, 'The International Legal Protection of Children in Armed Conflicts', 43 *ICLQ* (1994), who in discussing the draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, refers to the sometimes disproportionate amount of energy expended in seeking to raise standards, leaving less resources for their implementation.

<sup>163</sup> van Boven, note 124 above, at 6.

<sup>164</sup> *Report of the Bureau of the fifty-fourth session of the Commission on Human Rights submitted pursuant to Commission decision 1998/112. E/CN.4/1999/104* (1998).

qualifications.' Moreover, 'to preserve the image of the Sub-Commission as an independent expert body, no member should be concurrently employed in the executive branch of their country's Government.'<sup>165</sup> It is also recommended that the Sub-Commission's working methods in respect of its research and study projects be 'consistent with the independent expert character of the body, entail a well-prepared, thorough peer-review process' culminating in an analytical report to the Commission comprising the final text of the study, any agreed recommendations on further steps and a summary of the major observations of members of the Sub-Commission. This process should also provide for input from interested Governments, international organisations and NGOs, and experts should be prepared to 'dedicate adequate time to private deliberations on their projects.'

In themselves, the proposed measures are important in regard to depoliticising and enhancing the expertise of the Sub-Commission and the quality of its work. They are particularly significant, however, when read in conjunction with recommendation 13 concerning standard-setting working groups of the Commission which contains a number of measures which have a direct bearing on our observations regarding the need for more adequate procedures in relation to the planning and initiation of standard-setting exercises. Recognising the need to ensure that decisions to undertake any standard-setting exercise, 'which can involve a considerable commitment of time and resources by the United Nations and its Member States', are founded on the 'clearest possible appreciation of the purposes and prospective utility of the instrument envisaged, and the prospects of achieving those aims',<sup>166</sup> it is proposed that before referring any matter to a working group, the Commission should, where the necessary groundwork has not been carried out, request the Sub-Commission to undertake a study on the question and prepare a draft text of the instrument envisaged. 'Among the issues to be addressed in any such study, and in the Commission's deliberations on whether to proceed, careful consideration should be given to the purposes of any drafting exercise and to the guidelines set out in General Assembly resolution 41/120'.<sup>167</sup> It would be expected that such a study by the Sub-Commission, carried out in accordance with recommendation 12, i.e. by an independent expert, within the framework of a thorough peer-review process, including input from interested governments, international organisations

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<sup>165</sup> E/CN.4/1999/104, para.56, recommendation 12.

<sup>166</sup> Ibid., para.59.

<sup>167</sup> Recommendation 13 also identified issues pertaining to the establishment of time frames, the method of decision-making, and the role of chairs of such groups. Ibid., para.61.

and NGOs, would overcome some of the problems concerning planning, normative inconsistency and expertise.

Other relevant points to emerge from the Bureau's report are the following. Recommendation 13 also provides that in creating a standard-setting working group, the Commission should consider and agree on a specific time-frame within which the group should complete its work. While allowing for flexibility, depending on the nature of the instrument in question, it is recommended that the time-frame should not exceed five years. If, by the end of this mandate, the working group has been unable to achieve a result, it is recommended that the Commission set a 'period of reflection' of one or two years before any extension is provided. On the one hand this has the potential to improve upon past experiences in which the preparation of instruments in the Commission has taken up to ten years, as in the case of the Convention on the Rights of the Child. On the other hand, however, it does not and, indeed cannot, preclude the potential for prolonged debate in the General Assembly. In the case of the International Covenants, for example, the Commission completed its preparation of the drafts in six years. However, the Assembly's subsequent deliberations spanned in excess of ten years. Moreover, the imposition of a specific time-frame may result in increased pressure on working groups to reach decisions on draft articles by voting rather than by consensus. While this may have the benefit of alleviating the problem of States agreeing on the lowest-common denominator formulation of a particular article, the adoption of draft articles by a vote rather than by consensus may result in drafts which are simply unacceptable to some national delegations thereby undermining the instrument's potential for adoption and ratification. In recognition of the fact that specific time-frames may affect the means of decision-making in working groups, recommendation 13 points out that there is no rule of procedure requiring the Commission, ECOSOC or the General Assembly to adopt standard-setting instruments by consensus, and there are examples where consensus has not been achieved. It continues, however, that all efforts should be made at reaching consensus.

Recommendation 13 also provides that all chairs of working groups should have the standing authority to undertake, between meetings, informal contacts and consultations with a view to advancing progress in respect of the working group's mandate. Two points seem warranted in this regard. Firstly, this is a possible means of avoiding the type of situation just described, regarding the risks of voting

on draft articles and, for that matter, a lack of consensus impeding conclusion of the drafting process, in that the chair could informally mediate between national delegations with a view to reaching a position acceptable to all Parties. Secondly, it could enhance the opportunities for other interested Parties, in particular NGOs, to advance relevant concerns and suggestions, though this of course depends upon the attitude and openness of the individual chair towards NGOs.

### **2.7.1 Prospects for Reform**

For the most part, the foregoing measures constitute realistic proposals for enhancing the capacity, efficiency and quality of human rights treaty-making in the United Nations. But what are the prospects for actually giving effect to the proposed measures? After all, a number of the problems noted, such as planning and initiation and normative inconsistency, could have been addressed through proper implementation of the guidelines in General Assembly resolution 41/120. However, it seems that States and United Nations bodies have given insufficient consideration to the guidelines - despite their reaffirmation in the Vienna Declaration and Programme of Action and the call therein for United Nations human rights bodies to bear in mind in the guidelines when considering the elaboration of new international standards.<sup>168</sup> This is evident from the mandates given to the working groups established by the Commission in 1994 to draft the optional protocols to the Convention on the Rights of the Child on children in armed conflict, and the sale of children, child prostitution and child pornography.

The relevant resolutions do not formally request either group to give due consideration to the guidelines contained in resolution 41/120.<sup>169</sup> The working group on the draft protocol on the sale of children, in elaborating guidelines for a draft protocol, states in annex III of its report to the Commission, concerning procedural guidelines, that a draft optional protocol should be developed in conformity with the guidelines contained in resolution 41/120.<sup>170</sup> The Commission, however, subsequently charged the working group with the elaboration of a draft optional protocol on the basis of the guidelines contained only in annex I of the

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<sup>168</sup> A/CONF.157/23 (1993), Chap. II, Part A, para. 6.

<sup>169</sup> CHR res. 1994/90 and 1994/91.

<sup>170</sup> *Question of the draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as basic measures needed for their prevention and eradication. Report of the working group.* E/CN.4/1995/95 (1995), Annex III, para.1.

report which outlines a draft protocol and not those contained also in annex III, thus ignoring the group's explicit recommendation in respect of the need to conform with resolution 41/120.<sup>171</sup> That said, the Working Group's 1996 report to the Commission observes that in its general discussion on various questions relating to its mandate, the majority of delegations were of the opinion that the main objective of the protocol should be to fill the gaps in existing international standards with reference being made in this connection to resolution 41/120.<sup>172</sup> The working group on the draft protocol on children in armed conflict does not appear to have followed a similar course and has not formally considered the necessity to conform with the guidelines in resolution 41/120.<sup>173</sup>

Even where consideration is given to resolution 41/120 this does not necessarily ensure that normative inconsistencies do not occur, as demonstrated during the drafting of the Convention on the Rights of the Child. Article 38 (draft Article 20) of the Convention, concerning the involvement of children in armed conflicts is held to undermine existing standards in international humanitarian law through its failure to extend to children in armed conflicts a level of protection equal to that recognised in Additional Protocol II to the 1949 Geneva Conventions. At the 1988 session of the Commission's working group, Sweden noted that since the group's adoption of draft Article 20 in 1986, the General Assembly had drawn up the guidelines in resolution 41/120, urging Member States when developing new international standards to give due consideration to the existing international legal framework to ensure consistency with existing provisions of human rights law. Sweden pointed out that Article 20, as adopted in 1986, undermined existing standards of international humanitarian law and introduced a proposal containing amendments which would have brought the text of the draft article into line with existing humanitarian law. Numerous members of the working group and observers voiced their support for the proposal, 'indicating that it involved a considerable improvement on Article 20, because it complied with General Assembly resolution 41/120'.<sup>174</sup> However, opposition from a significant minority of States at the group's 1989 session and an

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<sup>171</sup> CHR res. 1995/78.

<sup>172</sup> *Question of the draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as basic measures needed for their prevention and eradication. Report of the working group on its second session.* E/CN.4/1996/101 (1996), para.25.

<sup>173</sup> See the reports of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts, on its first (E/CN.4/1995/96 (1995)), second (E/CN.4/1996/102 (1996)), third (E/CN.4/1997/96 (1997)), fourth (E/CN.4/1998/102 (1998)), and fifth (E/CN.4/1999/73 (1999)) sessions.

apparently confused atmosphere resulted in the adoption by consensus of the text of what is now Article 38(2) of the Convention<sup>175</sup> - and which has, of course, since been improved upon to some extent in the optional protocol to the Convention.

What then can be expected in regard to recommendations 12 and 13 of the Bureau's report? The Commission's consideration of the Bureau's report resulted in the establishment of an inter-sessional open-ended working group to continue the comprehensive examination of the report and to report thereon at the Commission's fifty-sixth session.<sup>176</sup> Of particular concern to the present analysis, the Commission considered that the Sub-Commission was in need of 'thorough review'. In addition to recommending an immediate change of title to 'Sub-Commission on the Promotion and Protection of Human Rights' - 'symbolising the intention to proceed to change, and also so as to better reflect the scope of the Sub-Commission's work' - the Commission also requested the working group to draw up recommendations for change for submission to the next session, taking into account the measures contained in recommendation 12. In drawing up its recommendations, the working group was requested to focus on the role and mandate of the Sub-Commission, giving consideration to the need to avoid duplication with the Commission and the central importance of the Sub-Commission's original role as a source of research, studies and expert advice; its composition, in term of size, independence and expertise of membership, geographical balance; and questions of effectiveness and efficiency, including duration of meetings. Noting recommendation 13 of the report, concerning the Commission's standard-setting working groups, the Commission requested the working group to further study the issues raised by the report in this regard and to prepare a recommendation for consideration at the fifty-sixth session.

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<sup>174</sup> E/CN.4/1988/28 (1988), para.74.

<sup>175</sup> E/CN.4/1989/48 (1989), paras. 600-611. Following the adoption of para.2, the representatives of several States indicated that they could not join the consensus on para.2 as it failed to extend to children in armed conflict a level of protection equal to that recognised in Additional Protocol II. At para.612.

<sup>176</sup> In particular, the Commission requested the working group to focus on the following areas in preparing recommendations for action at the fifty-sixth session: how to rationalise and strengthen the Commission's network of special procedures; and how to support the mechanisms in responding urgently and effectively when allegations or concerns of serious human right violations requiring immediate clarification and relief measures were brought to their attention. The working group was also requested to prepare recommendations on the 1503 procedure for decision at the next session, taking account of the suggestions contained in the Bureau's report. See 'Statement by the Chairperson, 28 April 1999, Review of Mechanisms', OHCHR/99/04/28 (29 April 1999).

Despite the potential to effect change, the working group's subsequent report falls short in a number of respects. With regard to the need to depoliticise the Sub-Commission, because of the 'complexities' of the issue, the working group 'stops short of defining the categories of employment which would exclude candidates from eligibility for election to membership of the Sub-Commission'. Instead, it lamely emphasises that persons putting their candidacies forward for membership, and governments in electing the membership 'should be conscious of the strong concern to ensure that the body is independent and seen to be so.'<sup>177</sup>

As concerns standard-setting, the Working Group notes that this will continue to be 'one of the central functions of the Commission' and picks up on some of the points in recommendation 13 of the report of the Bureau of the fifty-fifth session. Thus, it recommends that before referring any matter to a working group, the Commission should, where necessary, request the Sub-Commission to undertake a study of the issue at hand and prepare a draft text and comprehensive analysis of the instrument envisaged including careful consideration of the guidelines contained in General Assembly resolution 41/120.<sup>178</sup> However, unlike recommendation 12 of the report of the Bureau, the working group's report is silent on the question of the Sub-Commission's working methods in respect of its research and study projects. Thus, it does not refer to the need for Sub-Commission's research and study projects 'to entail a well-prepared, thorough peer-review process' culminating in an analytical report comprising the final text of the study, any agreed recommendations on further steps and a summary of the major observations of members of the Sub-

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<sup>177</sup> *Report of the inter-sessional open-ended working group on enhancing the effectiveness of mechanisms of the Commission on Human Rights*. E/CN.4/2000/112 (2000), para.45.

<sup>178</sup> *Ibid.*, para.58. In this connection, it is interesting to note that in 2001, the Commission on Human Rights decided to appoint an independent expert to examine the text of the draft optional protocol to the ICESCR and the comments thereon by States and to report back to the Commission in 2002 with proposals for future action, including the possible establishment of an open-ended working group of the Commission to further examine the question of the draft optional protocol. See CHR res. 2001/30. A similar decision was taken in regard to the draft international convention on the protection of all persons from enforced disappearance. In this case, the expert was mandated 'to examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, taking into account relevant legal instruments at the international and regional levels, intergovernmental arrangements on judicial cooperation, the draft international convention on the protection of all persons from enforced disappearance ... and also comments of States and intergovernmental and non-governmental organizations, with a view to identifying any gaps in order to ensure full protection from enforced or involuntary disappearance'. The Commission also decided to establish the following year, an inter-sessional open-ended working group of the Commission, with the mandate to elaborate, in the light of the findings of the independent expert, a draft legally binding normative instrument for the protection of all persons from enforced disappearance. See CHR res. 2001/46.



Commission. Nor does it refer to the inclusion of input from interested Governments, international organisations and NGOs in this process.

In line with recommendation 13, the working group also recommends that the Commission consider and agree on a time-frame within which its working groups should complete their work. Like the Bureau, the working group recommends a time-frame of five years which could vary depending on the nature of the instrument in question and the complexity of the issue. In the event that the desired result is not achieved within this period, the working group recommends one of three courses of action: extension of the mandate; a period of reflection during which time the chairperson should undertake wide consultations; and examination of the working methods of the working group in question.<sup>179</sup> Some of the possible pros and cons of the 'time-limit' approach have been noted above and need not be repeated here, suffice to say that unlike the Bureau, the working group does not comment on the question of the need, or not, for decision-making by consensus.

The working group also recommends, as did the Bureau, that all chairs of standard-setting working groups should have the standing authority to undertake, between meetings, informal contacts and consultations with a view to advancing progress in respect of the working group's mandate. It also recommends that they be provided with the necessary resources to undertake such activities.<sup>180</sup>

The report of the working group was considered during the Commission's fifty-sixth session in 2000, the outcome of which was Commission decision 2000/109. Pursuant to this decision the Commission decided to approve and implement comprehensively and in its entirety, the report of the working group. In addition, to facilitate the implementation of the report of the working group, the Commission transmitted a draft resolution and several draft decisions to ECOSOC for approval. Of particular relevance to the present analysis, draft decision 6 endorses the Commission's decision that chairpersons of standard-setting working groups shall have the standing authority to undertake informal consultations during the inter-sessional period with a view to advancing progress in respect of the working group's mandate.<sup>181</sup>

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<sup>179</sup> Ibid., para.60.

<sup>180</sup> Ibid., para.59.

<sup>181</sup> Endorsed by ECOSOC in its decision 2000/284.

### 3. Obstacles to the Effective Implementation of Treaties

That treaties are the primary means through which to institutionalise the protection of human rights is also questionable when one considers current and quite serious obstacles to the effective implementation of human rights treaties. According to international law, the way in which States give effect to their international treaty obligations is a matter for States themselves. States are 'generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations.'<sup>182</sup> This does not, however, mean that a treaty cannot prescribe so-called 'obligations of conduct' or of 'means' as well as 'obligations of result'.<sup>183</sup> In fact, it is crucial that they do so.<sup>184</sup> Firstly, successful implementation

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<sup>182</sup> Jennings and Watts, note 72 above, at 82.

<sup>183</sup> Obligations of result involve the attainment of a desired goal, such as no one shall be subjected to arbitrary arrest, detention or exile (Art.9 ICCPR), the achievement of which is left largely to the discretion of the state party. What distinguishes obligations of result from obligations of conduct or means is not, in the words of the ILC, 'that obligations "of conduct" or of "means" do not have a particular object or result, but that their object or result must be achieved through action, conduct or means "specifically determined" by the international obligation itself, which is not true of international obligations "of result".' *YBILC*, Vol. III, Part 2 (1977) 11.

<sup>184</sup> Human rights treaties often prescribe sometimes quite specific measures which States Parties are expected to take at the municipal level in order to give effect to their international obligations. For example, Art.2 ICCPR, following a non-discrimination clause which provides that a state party will ensure to all individuals within its territory and subject to its jurisdiction the rights recognised without distinction of any kind, such as race, colour, sex etc., provides in para.2 that '[w]here not already provided for by existing legislative or other measures, each State Party ... undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such *legislative or other measures* as may be necessary to give effect to the rights recognised in the present Covenant [emphasis added]'. Para.3 then provides that each State Party undertakes to ensure that any person whose rights or freedoms are violated shall have an effective remedy, that any person claiming such a remedy shall have their right thereto determined by a competent authority, and that the competent authorities will enforce such remedies when granted.

While Art. 2(2) does not give rise to an obligation on States Parties to incorporate the Covenant into their domestic legal systems (See Human Rights Committee, General Comment No. 3, and M. Nowak, *CCPR Commentary* (1993) 54; and Schachter, 'The Obligation to Implement the Covenant in Domestic Law', in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 311ff), in examining state reports and individual communications the Human Rights Committee has repeatedly noted that the obligation to ensure Covenant rights requires more than just the adoption of legislation alone. The Committee's General Comment No. 3 clearly notes the opinion of the Committee in this regard, stating that 'implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not *per se* sufficient. The Committee considers it necessary to draw the attention of States Parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States Parties have also undertaken to ensure the enjoyment of these rights to all individuals within their jurisdiction. This aspect calls for specific activities by States Parties to enable individuals to enjoy their rights.' See also Nowak, *ibid.*, at 55-56: 'the measures prescribed by Art.2(2) do not relate solely to repressive remedies against violations that have already taken place but rather include preventive measures and steps to ensure the necessary conditions for unimpeded enjoyment of rights ensured by the Covenant.' For example, the

of a treaty's provisions depends on how effectively national legal systems apply treaty norms; and secondly, there are substantial variations between domestic legal systems as to the modalities of giving effect to treaty norms.<sup>185</sup>

To assist and supervise States in the implementation of their human rights obligations, the six 'core' United Nations human rights treaties provide for a system of international supervision in the form of treaty monitoring bodies, some of which have been referred to above. The six treaty bodies are<sup>186</sup> the Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of the Convention on Racial Discrimination;<sup>187</sup> the Human Rights Committee (HRC), established under the ICCPR;<sup>188</sup> the Committee on the Elimination of Discrimination

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Committee has observed that protection of the right to life in Art.6 requires that States adopt positive measures, including measures aimed at reducing infant mortality and increasing life expectancy, especially measures to reduce malnutrition and epidemics. See Human Rights Committee, General Comment No. 6. See also D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 273.

<sup>185</sup> These national variations are apparent in the following passage by Simma, note 1 above, at 201, concerning how States 'handle' human rights treaties:

'Are human rights treaties made part of municipal law or will their obligations have to be "translated" into domestic legislation, or does a State Party even prefer to leave the treaty obligations "outside", so to speak, and simply add a touch here and there in its domestic law, if necessary? Second, if human rights treaties are designed to become part of the law of the land, does such internal validity come about automatically, as a sort of domestic side-effect of ratification or accession on the international plane or will the treaty have to be incorporated, and if so, by what means? In case of such automatic or otherwise effected incorporation, what is the rank of the human rights treaty *vis-à-vis* domestic statutes? Further, are human rights treaty provisions granted a self-executing character to the effect that individual claims before domestic courts may rely on them? In case of contradictions between human rights treaty law and domestic law, is the latter being adapted or repealed accordingly? On the more practical side: what is the attitude of municipal courts *vis-à-vis* incorporated human rights treaty provisions? Are the texts of human rights treaties published and disseminated on wide scale? Is human rights law taken into consideration in domestic education and training? Are individuals encouraged to rely on international human rights before domestic authorities and courts, and, if necessary, to have recourse to international complaint procedures?'

<sup>186</sup> The Migrant Workers Convention also provides for the establishment of a committee 'for the purpose of reviewing the application of the Convention' (Art.72). In view of the current problems facing the treaty-body regime (see below) it has been suggested that prior to its entry into force, the Convention should be amended so as to provide that the supervisory functions which the Convention entrusts to the new committee would instead be performed by one of the existing committees. By doing so now, 'the United Nations could avoid the expense of establishing an entire new supervisory apparatus, States Parties could avoid increasing the number of committees to which they must report and the number of occasions on which reports must be presented and evaluated, and the number of States which would have to ratify the amendment would be minimal. A failure to act now will only result in exacerbating a situation that most States already consider unwieldy.' *Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system. Note by the Secretary-General. E/CN.4/1997/74* (1996), para.96.

<sup>187</sup> Art.8.

<sup>188</sup> Art.28.

Against Women (CEDAW), established under the Convention on Women;<sup>189</sup> the Committee Against Torture (CAT), established under the Convention Against Torture;<sup>190</sup> the Committee on Economic, Social and Cultural Rights (CESCR), established by ECOSOC resolution 1988 (LX) (1976), to monitor compliance with the ICESCR; and the Committee on the Rights of the Child (CRC), established under the Convention on the Rights of the Child.<sup>191</sup> The treaty bodies play a crucial role in determining the nature and extent of States' obligations under the various treaties and almost certainly to a greater degree than States might themselves be so inclined in the absence of such bodies. As one observer has remarked, the treaty bodies are becoming 'an indispensable cornerstone of the United Nations human rights programme'.<sup>192</sup>

The principal activity of all the treaty bodies is the consideration of reports from States Parties on their implementation of the treaty in question.<sup>193</sup> Generally, States

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<sup>189</sup> Art.17.

<sup>190</sup> Art.17.

<sup>191</sup> Art.43.

<sup>192</sup> See P. Alston, *Interim report on study on enhancing the long-term effectiveness of the United Nations human rights treaty regime*. A/CONF.157/PC/62/Add.11/Rev.1 (1993), para.54.

<sup>193</sup> In addition to States' reports, implementation of four of the six core treaties is also effected through complaints procedures which operate on the basis of inter-state and individual complaints. Art.41 ICCPR, for example, provides that a state party to the ICCPR may at any time declare that it recognises the competence of the Human Rights Committee to receive and consider communications alleging the non-fulfilment of obligations on the part of another State Party, albeit contingent on the recognition of the competence of the Committee on the part of the respondent State. Similar provisions are to be found in Arts.11-13 of the Convention on Racial Discrimination, Art.21 of the Convention Against Torture, and Art.76 of the Migrant Workers Convention. Individual complaints procedures are currently implemented by the HRC under the first Optional Protocol to the ICCPR, CERD pursuant to Art.14 of the Convention Against Racial Discrimination, and CAT under Art.22 of the Convention Against Torture. In October 1999, the General Assembly adopted the Optional Protocol to the Convention on Women in its resolution 54/4. The optional protocol, which allows individuals and groups of women to complain to CEDAW about violations of the Convention and enables the Committee to conduct inquiries into grave or systematic abuses of women's rights in countries that are party to the Protocol, was opened for signature and ratification by States in December 1999. An individual complaints procedure is also provided for in Art. 77 of the Migrant Workers Convention.

Discussions have been underway for several years now with a view to drafting an optional protocol to the ICESCR providing for individual complaints procedures. The CESCR first discussed the issue in 1990 and was encouraged, along with the Commission on Human Rights, to continue the examination of the issue by the Vienna Declaration in 1993 (A/CONF.157/24, part II, para.75). The CESCR concluded its consideration of a draft optional protocol and its report was submitted to the Commission at its fifty-third session (E/CN.4/1997/105 (1996)). At its fifty-fourth session in 1998, the Commission requested the High Commissioner for Human Rights to urge all States Parties to the ICESCR to submit their comments on the draft protocol contained in the CESCR's report. At its fifty-seventh session in 2001, the Commission decided to appoint an independent expert to examine the question of a draft optional protocol to the ICESCR in the light of the draft text, the comments made in that regard by States, intergovernmental organisations and NGOs, as well as the

are required to report within one or two years of ratification of the treaty and thereafter at five year intervals or as requested.<sup>194</sup> While reporting was initially envisaged by States as a formality, it has gradually evolved into a substantially more demanding exercise. In February 1989 the CESCR adopted a general comment on the functions of reporting by States Parties which has generally been accepted by the other treaty bodies.<sup>195</sup> According to the general comment, it is incorrect to assume that reporting is essentially a procedural matter 'designed solely to satisfy each State Party's formal obligation to report to the appropriate international monitoring body.' On the contrary, 'the processes of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives',<sup>196</sup> for example, ensuring that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices to ensure the fullest possible conformity with the Covenant; and that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are or are not being enjoyed by all individuals within its territory or under its jurisdiction.

Reporting procedures have also been strengthened through changes initiated by the treaty bodies. These include 'inviting' States to send representatives to respond to questions by Committee members when the report of that State is being

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report of a workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol, convened by OHCHR and the International Commission of Jurists in March 2001. The expert is to report to the Commission at its fifty-eighth session with a view to its consideration of possible follow-up and future actions, including the establishment of an open-ended working group of the Commission to examine the question of a draft optional protocol. CHR res.2000/30. See further, *Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. Report of the High Commissioner for Human Rights. E/CN.4/2001/62* (2000) and *Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. E/CN.4/2001/62/Add.2* (2001).

<sup>194</sup> Art.40 ICCPR for example provides that

'1. States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights:

- (a) within one year of the entry into force of the Covenant for the States Parties concerned;
- (b) thereafter, whenever the Committee so requests.'

Alternatively, Art.40 of the Convention on the Rights of the Child provides that

'1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights:

- (a) Within two years of the entry into force of the Convention for the State Party concerned;
- (b) Thereafter every five years.

<sup>195</sup> H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (1996) 558.

<sup>196</sup> CESCR, General Comment No. 1 (1989).

considered, as instituted by CERD in 1972<sup>197</sup> and since adopted by all committees; and the practice of examining the situation in countries that have failed to report, even in the absence of information and representatives from the government. This was initiated by the CESCR in 1991<sup>198</sup> and 'removes the pre-existing reward to governments that ratified and never reported, thus avoiding committee scrutiny.'<sup>199</sup> The treaty bodies have also moved away from relying exclusively on information from governmental sources and utilise all available sources, including written and oral submissions from NGOs.<sup>200</sup>

The implementation of human rights treaties through the system of reports has been 'vindicated in practice', 'has the potential to be an important and effective means by which to promote respect for human rights', and has recorded 'considerable achievements'.<sup>201</sup> However, it has not been without its problems, some of which give rise to serious concerns as to both the desirability and utility of drafting further human rights treaties which, in particular, provide for some form of reporting procedure. Problems are numerous and include the failure of States to produce timely and adequate reports; failure to engage in reform activities in the course of producing reports; sending uninformed representatives to the examination

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<sup>197</sup> See Partsch, note 10 above, at 354. According to Partsch, the 'dialogue established as a result of this very significant innovation has proved to be a valuable element in the relationship between CERD and the States Parties.' *Ibid.*, at 354.

<sup>198</sup> This approach was endorsed by the fourth meeting of chairpersons which recommended 'that each treaty body follow, as a last resort, and to the extent appropriate, the practice ... of scheduling for consideration the situation in States Parties that have consistently failed to report or whose reports are long overdue'. A/47/628, para.71.

<sup>199</sup> Steiner and Alston, note 195 above, at 558. The importance of this innovation is clear when one considers that the price of failure of States to report is paid ultimately by the system itself. 'The treaty regime must inevitably lose some of its precious credibility if a State can ostentatiously signal its acceptance of a significant range of obligations and then thumb its nose at the committee. Acceptance of such a situation also leads to a system of double standards whereby some States Parties regularly subject themselves to monitoring and to the probing of the treaty bodies while others are not subjected to any such scrutiny, even though their records may be far less satisfactory.' A/CONF.157/PC/62/Add.11/Rev.1, at para.111.

<sup>200</sup> Steiner and Alston, note 195 above, at 558. The CESCR was the first committee to permit the formal submission of written statements NGOs, starting in 1988. Also, virtually all members of the Committee have shown a willingness to ask State representatives to respond to information emanating specifically from NGO sources. See Alston, 'The Committee on Economic, Social and Cultural Rights', in P. Alston, *The United Nations and Human Rights: A Critical Appraisal* (1992) 501.

<sup>201</sup> E/CN.4/1997/74, at para.9. The General Assembly in its resolution 43/115 stated in the preamble that '[t]he effective implementation of instruments on human rights, involving periodic reporting by States Parties to the relevant treaty bodies and the efficient functioning of the treaty bodies themselves, not only enhances international accountability in relation to the protection and promotion of human rights but also provides States Parties with a valuable opportunity to review policies and programmes affecting the protection and promotion of human rights and to make any appropriate adjustments'.

of reports by the committees; failing to respond to questions during examination of reports by the committees; and electing government employees rather than independent experts to committee membership. The treaty bodies for their part have been criticised for failing to point out the inadequacies of oral responses by state representatives; for not following-up deficiencies in reports by requesting further information; for failing to issue direct and forceful conclusions about the adequacy of state reports; for not sufficiently isolating and criticising States with long overdue reports, and for their reluctance to comment on the inadequacy of state representatives.<sup>202</sup>

In addition, the increased ratification of human rights treaties has inevitably resulted in a proliferation of reporting obligations for States which has served to further compound the dual problem of timely submission of adequate reports. A state which is a party to many or all six of the core treaties is required to report under each, even though there may exist overlap between parts of reports to, for example, CAT, the HRC, and the CRC whose respective treaties contain provisions relating to the prevention of torture.<sup>203</sup> Because of the number of and overlap among these obligations, some have questioned 'whether the system will eventually become - or indeed has already become - unsustainable'.<sup>204</sup> Firstly, there is the complex bureaucratic burden placed on States. As one report notes:

Over the course of the next decade, close to universal ratification of the six core treaties is likely to be achieved. States will be under increased pressure to honour their reporting obligations... States will be expected to produce six reports, to engage in six separate 'constructive dialogues', to answer additional ad hoc requests from six committees... They will also be expected to take full account of

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<sup>202</sup> Bayefsky, note 79 above, at 239 and 246-249. For a much more detailed account of the problems and difficulties confronting the UN treaty implementation regime see further A. Bayefsky (ed), *The UN Human Rights Treaty System in the Twenty-First Century* (2000) and, by the same author, *The UN Human Rights Treaty System: Universality at the Crossroads* (2001). See also, International Law Association, Committee on International Human Rights Law and Practice, 'Report on the UN Human Rights Treaties: Facing the Implementation Crisis', in ILA, *Report of the Sixty-Seventh Conference* (1996) 341-3.

<sup>203</sup> Moreover, the problem of proliferating reporting requests is not limited to the treaty bodies but is 'multifaceted': 'Viewed from the perspective of a specific State, requests may emanate from any or all of the following sources: (a) United Nations treaty bodies; (b) United Nations policy-making organs and most notably the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities and their respective subsidiary bodies; (c) specialised agencies and in particular ILO and UNESCO; (d) regional human rights treaty bodies; and (e) regional human rights policy-making organs.' A/CONF.157/PC/62/Add.11/Rev.1, at para.126.

<sup>204</sup> Steiner and Alston, note 195 above, at 559.

general comments (or their equivalents) emanating from six different committees and to respond to increasingly detailed concluding observations from the same number of committees.<sup>205</sup>

Secondly, the reporting system itself faces vast and complex administrative and financial challenges. It is estimated that in order to cope with the close to universal ratification of the six core human rights treaties, the treaty bodies will need to at least double their existing meeting time so that the CRC alone would be meeting for almost six months of the year. The currently 'large' backlog of unexamined communications will rise and will address increasingly complex issues requiring greater expertise. The size of the secretariat servicing the treaty bodies would need to be at least doubled in order to maintain existing - and inadequate - levels of service. The costs of conference servicing will rise exponentially, making major additional demands on services which are currently subject to dramatic cuts.<sup>206</sup>

An interim report on long-term approaches to enhancing the effectiveness of the treaty bodies has suggested three options for reducing reporting burdens: reducing the number of treaty bodies and hence the number of reports required; encouraging States to produce a single 'global' report to be submitted to all relevant treaty bodies; and replacing the requirement of comprehensive periodic reports with specially-tailored reports.<sup>207</sup> While there has been significant support for reform, Steiner and Alston note that many observers are concerned about attempts to overhaul the entire reporting system. 'Depending on perspective, they fear that proposals for such systematic reform might either be used to mask a significant downgrading of reporting or, alternatively, to strengthen the system of reporting to a

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<sup>205</sup> E/CN.4/1997/74, at para.81. This is further compounded by reporting obligations or requirements of States which may arise under other human rights instruments, such as those found in the field of crime prevention and criminal justice, as well as under international treaties in other areas, such as environmental protection. States are, for example, periodically requested to reply to questionnaires concerning the implementation of eleven instruments adopted in field of crime prevention and criminal justice, such as the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, and the Basic Principles on the Independence of the Judiciary.

<sup>206</sup> E/CN.4/1997/74, at para.83. See further Evatt, 'Ensuring Effective Supervisory Procedures: The Need for Resources', in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 461: 'Maintaining the supervisory procedures of the human rights treaty bodies calls for a certain sleight of hand - to turn less into more. At a period when the treaty bodies are seeking to make the monitoring system more effective, and when the demands on them are increasing (more parties, more reports, more individual communications), the resources available to support their work seem to be diminishing'. See also, Schmidt, 'Servicing and Financing Human Rights Supervisory Bodies', in Alston and Crawford, *ibid*, at 481ff.

<sup>207</sup> A/CONF.157/PC/62/Add.11/Rev.1, at paras.166-182.



politically unacceptable extent.<sup>208</sup> While such views are not necessarily without foundation they appear to be sadly premature. The final 1997 report on long-term approaches to enhancing the effectiveness of the treaty bodies noted that there had been no exchange of views on the long-term options for reducing reporting burdens despite the urgency of the debate and the fact that the existing system is not sustainable a fact which will compel radical changes of one type or another within less than a decade. As the report observes, the only real question is 'whether they will be of an *ad hoc*, reactive and incomplete nature or whether they will have been planned logically and systematically.'<sup>209</sup> Four years on, and despite the existence of additional comprehensive studies of the issues, the situation seems little changed.<sup>210</sup>

#### 4. Conclusion

Although treaties will in many cases remain the preferred, and in some cases possibly the only law-making option, the problems discussed above – the difficulties of obtaining consensus resulting in long, drawn-out and sometimes stalled negotiations; the implications of the consensus technique for obtaining ratifications

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<sup>208</sup> Steiner and Alston, note 195 above, at 559.

<sup>209</sup> E/CN.4/1997/74, at para.81.

<sup>210</sup> See P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000); and Bayefsky, note 202 above. That said, in April 2001 the Australian Government has announced a range of measures 'aimed at making the United Nations treaty committee system more efficient and workable and to increase momentum for their reform.' The initiative includes plans for a series of workshops to look at 'practical ways of addressing key reform issues' including 'streamlining the operation of the committees, improving the interface between UN committees, countries and non-governmental organisations and developing more effective treaty body architecture for a stronger and more responsive system.' See Department of Foreign Affairs and Trade, 'Australian Initiative to Improve the Effectiveness of the UN Treaty Committees', Media Release (5 April 2001). While such initiatives are in general to be welcome it is perhaps wise to recall also that Australia's recent cooperation with the treaty bodies has not been entirely fruitful. In August 2000, Australia was strongly criticised by Human Rights Watch after three Government ministers issued a joint statement calling for a "complete overhaul" of U.N. human rights treaty bodies to "ensure that Australia gets a better deal" from them. According to Human Rights Watch, the Government had been particularly angered by criticism from the Committee on the Elimination of Racial Discrimination, Committee Against Torture and the Human Rights Committee. As a result, the Government announced that it would not extend full cooperation to the treaty bodies and would fight against a greater role for nongovernmental organizations in the treaty bodies' activities. See Human Rights Watch, *Australia Undermining Global Human Rights*, Human Rights Watch Press Release (31 August 2000). Australia was similarly criticised by the International Commission of Jurists which regarded Australia's decision to review its participation in the treaty bodies of the United Nations as an 'unhelpful precedent' which would inevitably be perceived as 'giving encouragement to those States who reject the legitimacy of UN human rights mechanisms and seek to avoid critical scrutiny of their human rights performance.' International Commission of Jurists, *ICJ Expresses Concern at Australian Position on UN Treaty Bodies* (30 August 2000).

and accessions even from States that had supported and signed the treaties; the structural and procedural weaknesses of treaty-making; and the problems confronting the effective implementation of treaties – have undermined the utility of treaty-making and treaties as the principal means through which to seek to enhance and further develop the protection of human rights, in particular with regard to new and emerging areas requiring international regulation.

While the need for reform has gone unheeded in some quarters, the problems and weaknesses of existing techniques for the development and implementation of treaties have been well-heeded in others and have prompted recourse to alternative and more nuanced standard-setting and implementation techniques. A pertinent example in this regard has been the approach of the Representative of the Secretary-General on Internally Displaced Persons to developing a normative framework for the assistance and protection of internally displaced persons. An approach which sought to avoid the limitations of the traditional state-centric treaty-making process and instead, to consolidate the provisions of human rights and humanitarian law relevant to the internally displaced and to address the gaps and grey areas therein through a restatement of existing norms by intergovernmental and non-governmental actors in the form of the non-binding the Guiding Principles on Internal Displacement. It is an approach to which we now turn.

**RECOURSE TO ALTERNATIVE LAW-MAKING TECHNIQUES – DEVELOPING A  
NORMATIVE FRAMEWORK FOR THE INTERNALLY DISPLACED**

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In 1992, in response to the growing international concern at the large number of internally displaced persons throughout the world and their need for assistance and protection, the United Nations Secretary-General, at the request of the Commission on Human Rights, appointed Francis Deng as the Representative of the Secretary-General on Internally Displaced Persons.<sup>1</sup> The mandate of the Representative has since been renewed on four occasions, most recently in April 2001.<sup>2</sup> During this time the mandate has focused on three main areas of work: visits to countries affected by internal displacement; promoting an institutional framework at both the international and regional levels; and developing a legal or normative framework for the protection and assistance of internally displaced persons.

Although each of these areas is of interest in its own right, the present analysis is concerned with the development of the normative framework, a significant feature of which has been the Representative's avoidance of the traditional intergovernmental law-making process of negotiating, drafting and adopting a treaty in favour of a more nuanced and flexible approach resulting in a restatement of existing international norms in the form of the Guiding Principles on Internal Displacement, as presented by the Representative to the Commission on Human Rights in 1998. The motives behind the Representative's approach and the opportunities arising therefrom are discussed in part four of this chapter. In the meantime, by way of background part one provides an overview of the international response to internal displacement, as manifested for the most part in the appointment of the Representative of the Secretary-General. Part two provides a narrative of the steps and efforts undertaken by the Representative to develop the normative framework while part three seeks to place those efforts in their broader law-making context.

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<sup>1</sup> CHR res. 1992/73.

<sup>2</sup> See CHR res. 1993/95, 1995/57, 1998/50 and 2001/53.

## 1. The International Response to Internal Displacement<sup>3</sup>

The origins of the international community's response to internal displacement lie in the late 1980s during which time internal displacement became a subject of increasing international concern. The lack of an appropriate international institution or mechanism to ensure the delivery of assistance to the five million internally displaced persons in Angola and Mozambique was a central issue raised at the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED), held in Oslo in 1988.<sup>4</sup> Prompted by SARRED, in 1989 the General Assembly requested the Secretary-General 'to consider the need for the establishment, within the United Nations system, of a mechanism or arrangement to ensure the implementation and overall coordination of relief programmes to internally displaced persons'.<sup>5</sup> Not content with the Secretary-General's subsequent report, and noting the 'substantial increase in the numbers of refugees, displaced persons and returnees and their impact on the development prospects of the often fragile economic infrastructures of the countries concerned', in 1990 the Economic and Social Council requested the Secretary-General to initiate a United Nations system-wide review to assess the experience and capacity of United Nations entities in the provision and coordination of relief assistance to and protection of refugees, displaced persons and returnees.<sup>6</sup> Meanwhile, in the Americas, the 1989 International Conference on Central American Refugees (CIREFCA), recognised that conflicts in the region had not only resulted in refugees but also in internally displaced persons who need special assistance, even

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<sup>3</sup> Part one is based on extensive interviews with Martin Macpherson, Roberta Cohen, and Professors Walter Kälin, and Robert Goldman.

<sup>4</sup> See para.21, Oslo Declaration and Plan of Action on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa. SARRED doc. 88/5 (24 August 1988). Reproduced in UNHCR, *Collection of International Instruments and other Legal Texts Concerning Refugees and Displaced Persons. Volume II. Regional Instruments* (1995) 46.

<sup>5</sup> GA res. 43/116 (1988). See further, *International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa. Report of the Secretary-General. A/44/520* (1989).

<sup>6</sup> ECOSOC res. 1990/78. The request resulted in the *Report on refugees, displaced persons and returnees, prepared by Mr. Jacques Cuénod, Consultant. E/CN.4/1990/Add.1* (1991). In the report, Cuénod observes that the Secretary-General's 1989 report states that the Secretary-General 'does not believe it necessary or appropriate to establish a new mechanism or arrangement to ensure the implementation of overall coordination of relief programmes to internally displaced persons. The fact that one year later the Economic and Social Council requested the Secretary-General to undertake a system-wide review of a wider scope may be an indication that Governments feel a more structured arrangement is warranted' (para.30).

though they remain subject to the jurisdiction and protection of their national authorities.<sup>7</sup>

Increased attention to the issue was also motivated by changing attitudes to refugee protection during the 1970s and 1980s. The international refugee protection regime, as provided by the 1951 Convention relating to the Status of Refugees<sup>8</sup> and the 1967 Protocol,<sup>9</sup> was established in response to the European refugee problem in the aftermath of World War Two, in order to protect persons fleeing their country on account of a 'well-founded fear of persecution'.<sup>10</sup> However, as the system developed and as the number of the world's refugees increased, so attention shifted to the need for the system to take into account the root causes of refugee flows in an effort to prevent them. Forced displacement was increasingly linked to human rights abuses in countries of origin which inevitably led to increased attention to the plight of the internally displaced.<sup>11</sup> As one commentator observes: 'Part of the impetus for addressing the problem [of internal displacement] grows out of the international community's interest in averting or preventing mass refugee flows. Effectively dealing with the problems of persons still in their countries of origin is

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<sup>7</sup> Para.7, chap. II, part 1, s.A., Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons.

<sup>8</sup> Adopted on 28 July 1951. In United Nations, *A Compilation of International Instruments*, Vol. I, Second Part (1994) 638.

<sup>9</sup> Taken note of by ECOSOC res.1186 (XLI) (1966) and GA res.2198 (XXI) (1966). In *International Instruments*, *ibid.*, at 655.

<sup>10</sup> According to Article 1(A)(2) of the Convention relating to the Status of Refugees and the 1967 Protocol, a refugee is any person who '...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

<sup>11</sup> See, for example, A. Zolberg, S. Aguayo and A. Suhrke, *Escape from Violence. Conflict and the Refugee Crisis in the Developing World* (1989) 258-259, referring to Canadian and West German initiatives in the Commission on Human Rights and General Assembly respectively. These resulted in Sadruddin Aga Khan's *Study on Human Rights and Mass Exoduses*. E/CN.4/1503 (1981); and *Report of the group of governmental experts on international cooperation to avert new flows of refugees*. A/41/324 (1986). On the work and discussions of the latter see Lee, 'The UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees', 78 *AJIL* (1984) 480, and part II, 81 *AJIL* (1987) 442; and by the same author, 'Toward a World Without Refugees: The United Nations Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees', 57 *BYBIL* (1986) 317. See also Martin, 'Large-Scale Migrations of Asylum Seekers', 76 *AJIL* (1982) 598; L. Drücke, *Preventive Action for Refugee Producing Situations* (1990); Stavropoulou, 'The Right Not to be Displaced', 9 *Am. U. J. Int'l. L. & Pol.* (1994) 707-709; and Suhrke, 'Towards a Comprehensive Refugee Policy: Conflict and Refugees in the Post-Cold War World', in W.R. Böhning and M. Schloeter-Paredes, *Aid in Place of Migration?* (1994) 15.

believed to offer the best hope of stemming the growing tide of refugees and asylum seekers'.<sup>12</sup>

This particular aspect of the issue has not been without its critics. Michael Barutciski, for example, argues that for the governments of the industrialised States, 'the new interest in internal displacement results from the reluctance of host populations to have contact with refugees and a desire to deal with forced migration in terms of containment'.<sup>13</sup> As such, international concern with the plight of the internally displaced should perhaps be ranked among the litany of measures employed by such States to undermine the refugee protection regime during the last two decades such as visa requirements on the nationals of refugee-producing States, carrier sanctions, burden-shifting arrangements, so-called 'safe country' lists and forcible interdiction of refugees at frontiers and in international waters.<sup>14</sup>

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<sup>12</sup> R. Cohen, *International Protection for Internally Displaced Persons - Next Steps*. RPG Focus Paper No. 2 (1994).

<sup>13</sup> Barutciski, 'Tensions Between the Refugee Concept and the IDP Debate', *Forced Migration Rev.* No. 3 (December 1998) 11. For responses to Barutciski's argument and a rebuttal from the author, see *Forced Migration Rev.* No. 4 (April 1999) 29-35. Others have expressed concern over the role to be played by UNHCR with regard to the internally displaced and specifically the risk that the organisation might be drawn into activities that could undermine its own refugee-specific mandate. Guy Goodwin-Gill for example, citing UNHCR's involvement in Kosovo and Bosnia as examples where its protection function has been questionable, notes that 'UNHCR has no legal basis to protect internally displaced people, but must proceed by consent of the sovereign state and any *de facto* fighting force exercising control over the territory in question.' This, he suggests, leads UNHCR down the path of operating outside its recognised legal role. 'As soon as [UNHCR] accepts mandates from others,' he said, 'such as the UN Secretary-General, it abandons any claim to autonomy. It steps into a political minefield, replete with conflicts of interest, and must pay the political price; so too, unfortunately, must its principal constituency.' Goodwin-Gill, 'UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield', in US Committee for Refugees, *World Refugee Survey 2000* (2000).

<sup>14</sup> See for example, Hathaway, 'The Emerging Politics of Non-Entrée', *Refugees* No.91 (1992) 40, and 'Harmonising for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration', 26 *Cornell Int'l. L. J.* (1993) 722. Of many other possibilities see also, Amnesty International, *Refugees: Human Rights Have No Borders* (1997); Byrne and Shacknove, 'The Safe Country Notion in European Asylum Law', 9 *Harv. HR. L. J.* (1996); European Council on Refugees and Exiles, *Safe Third Countries: Myths and Realities* (1996); E. Guild and J. Niessen, *The Development of Immigration and Asylum Policies in the European Union* (1996); D. Joly, *Haven or Hell? Asylum Policies and Refugees in Europe* (1996); R. Wallace, *Refugees and Asylum: A Community Perspective* (1996); Berthiaume, 'Asylum Under Threat', *Refugees*, No.101 (1995); Kumin, 'Protection Of or Protection From Refugees?', *Refugees*, No. 101 (1995), and 'Asylum in Europe: Sharing or Shifting the Burden?', in US Committee for Refugees, *1995 World Refugee Survey* (1995) 28; K. Newland, *US Refugee Policy: Dilemmas and Directions* (1995); Keely and Russel, 'Responses of Industrialised Countries to Asylum Seekers', 47 *J. Int'l. Affairs* (1994) 399; Joly, 'The Porous Dam: European Harmonisation on Asylum in the 1990s', 6 *IJRL* (1994) 159; Kjaergaard, 'The Concept of "Safe Third Country" in European Asylum Law', 6 *IJRL* (1994); Martin, 'Interdiction, Intervention and the New Frontiers of Refugee Law and Policy', 33 *Virginia J. Int'l. L.* (1993) 473; G. Loescher (ed), *Refugees and the Asylum Dilemma in the West* (1992); Cruz, 'Carrier Sanctions in Four EC States: Incompatibilities between International Civil Aviation and Human Rights Obligations', 4 *J. Refugee Studies* (1991) 76;

Before reaching such a conclusion, however, it is pertinent to consider that the major impetus behind international recognition of the problem of internal displacement lay not with States, nor for that matter with intergovernmental organisations. On the contrary, it lay with a group of NGOs mobilised as a result of problems encountered in gaining access in the field to large numbers of 'internal refugees' in need of assistance and protection. For Martin Macpherson of the Friends World Committee for Consultation (Quakers), Beth Ferris of the World Council of Churches (WCC), and Roberta Cohen of the Refugee Policy Group (RPG) there was an urgent need to raise the issue at the international level.

In February 1990, the Quaker United Nations Office in Geneva invited Cohen to address a meeting which brought together diplomats and representatives of intergovernmental and non-governmental organisations to discuss the issue and ways in which to proceed.<sup>15</sup> Although the discussions were productive they were also cautious. The Cold War was winding down and there was uncertainty over the future and the manner in which the United Nations could proceed with an issue so clearly within the domestic jurisdiction of States. Representatives of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Development Programme (UNDP) questioned whether this was an issue for the United Nations; that its magnitude and internal nature raised too many potential problems for the Organisation. Undeterred, Macpherson, Ferris and Cohen continued to discuss possible options for raising the issue. Of these, the then Sub-Commission on Prevention of Discrimination and Protection of Minorities was considered inappropriate as it was not an academic study that was required at this point. UNHCR's Executive Committee was discounted on the grounds that it was for all intents and purposes concerned with refugee issues. Given that the General Assembly was less accessible to NGOs and ostensibly a political body, this effectively left the Commission on Human Rights.

In consultation with WCC, and informally with the International Committee of the Red Cross (ICRC) and UNHCR, Macpherson drafted a written statement for submission to the Commission in 1991 in the form of a draft resolution in order to

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O'Keefe, 'The Schengen Convention: A Suitable Model for European Integration?', 11 *YEL* (1991) 185; and Noll and Vedsted-Hansen, 'Non-Communitarians. Refugee and Asylum Policies', in P. Alston (ed), *The EU and Human Rights* (1999) 359.

<sup>15</sup> Cohen, *UN Human Rights Bodies Should Deal with the Internally Displaced*, RPG (1990).

assist the Commission in taking the issue forward.<sup>16</sup> Macpherson harboured no great expectations that the issue would be taken up at that session of the Commission. Rather, the statement was intended as a tool for engaging States in dialogue on the issue. However, during the session, Macpherson raised the issue at a meeting convened by the French mission in Geneva between human rights-minded diplomats, present in their personal capacity, and NGOs. The Austrian delegate requested to see the statement and later agreed to take up the issue on the grounds that it was an important issue and something needed to be done. Austria subsequently introduced a draft resolution on internally displaced persons, based for the most part on the Quaker's written statement, which was adopted without a vote.<sup>17</sup>

### **1.1 Analytical Report of the Secretary-General**

The key feature of the resolution was a request for an analytical report from the Secretary-General on the human rights dimensions of internal displacement. While this was a significant result for the NGO community it was also no time for complacency. It was necessary to ensure firstly, that the analytical report did not get 'lost' within the United Nations system; and secondly, that NGOs remained firmly in the driving seat. Both these tasks were facilitated in June 1991 at an international conference in Washington DC on human rights protection for internally displaced persons, convened by the RPG. The conference was attended by a broad range of international experts including human rights lawyers, experts from humanitarian organisations, officials from the United Nations, regional organisations and governments. Also participating was George Mautner-Markhoff, chief of the branch at the United Nations Centre for Human Rights responsible for drafting the analytical report on internally displaced persons.

The conference was primarily geared towards discussing the international legal framework and the possible appointment of a United Nations human rights mechanism on internally displaced persons. With regard to the former, participants emphasised the need to clarify and strengthen the relevant existing international

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<sup>16</sup> *Written statement submitted by the Commission of the Churches on International Affairs and the Friends World Committee for Consultation (Quakers), non-governmental organisations in consultative status (category II).* E/CN.4/1991/NGO/1 (1991).

<sup>17</sup> In introducing the draft resolution on behalf of the sponsors, Austria expressed its appreciation to the Quakers and the Commission of the Churches for the written statement. *Summary record of the 52nd meeting.* E/CN.4/1991/SR.52 (1991), para.38.



norms. To the extent to which new international standards were necessary, most participants favoured their incremental development through block building resolutions, declarations and codes of conduct leading to customary international law and the adoption of binding treaties.<sup>18</sup> Regarding the establishment of a United Nations human rights mechanism, it was recommended that the Commission appoint a working group or rapporteur on internally displaced persons. In this regard, the participants expressed the hope that the analytical report being prepared on internally displaced persons would 'support this proposal and urge the establishment of effective machinery to address the problem of internal displacement.'<sup>19</sup>

The Secretariat duly obliged and both the legal and institutional aspects of the issue were addressed in the report.<sup>20</sup> The report noted that although the problems and needs of the internally displaced can be defined in terms of already recognised rights, the situation in which they find themselves differs significantly from that of the general population.<sup>21</sup> Consequently, it suggested the elaboration of more specific principles or guidelines on the treatment which should be accorded to the internally displaced in order to ensure effective protection of their human rights.<sup>22</sup> With regard to the appointment of a United Nations human rights mechanism, it concluded that if the United Nations human rights system was to assume the responsibility of participating more actively in the response of the international community to humanitarian crises involving displaced persons, it would be required to appoint a focal point on the issue.<sup>23</sup>

The report was submitted to the Commission in 1992. Hungary considered it to contain a fair and comprehensive analysis of the basic situations which could serve as a starting point for further deliberations by a working group of the Commission. A joint statement by the Quakers, WCC, and Caritas proposed the establishment of a

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<sup>18</sup> Refugee Policy Group, *Human Rights Protection for Internally Displaced Persons: An International Conference, June 24-25 1991* (1991) 22-23.

<sup>19</sup> *Ibid.*, at 23.

<sup>20</sup> *Analytical report of the Secretary-General on internally displaced persons.* E/CN.4/1992/23 (1992).

<sup>21</sup> According to the report: 'Internally displaced persons typically have suffered from a series of human rights violations which add up to a characteristic and distinctive syndrome. The cumulative effect of these violations, together with the fact of having been forced to flee their home and the difficulties, risks and deprivations invariably associated with their new situation, make their needs qualitatively different from those of other persons.' *Ibid.*, at para.91.

<sup>22</sup> *Ibid.*, at para.92.

<sup>23</sup> *Ibid.*, at para.110.

working group of five independent experts to examine the protection needs of internally displaced persons and submit a report on its findings to the Commission's next session.<sup>24</sup> The RPG referred to the Washington Conference and its recommendation that the Commission appoint a working group or rapporteur to address the protection needs of the internally displaced.<sup>25</sup> Finally, the United Nations High Commissioner for Refugees hoped the Commission would agree on an appropriate follow-up mechanism to enhance the protection of the internally displaced.<sup>26</sup>

Consultations between Cohen, Macpherson and Ambassador Christian Strohal of the Austrian delegation to the Commission ensured that the draft resolution reflected the significant features of the analytical report, notably the appointment of a focal point and an examination of the existing legal framework, although when it came to adopting the resolution, the appointment of a focal point was a rather contentious issue. The initial draft of the resolution provided for an 'independent expert' (opted for by the Western group on the grounds that a single expert would be more effective and less costly than a working group) gathering all the requisite information and the views of interested Governments, and submitting a complete study on the question to the Commission at its next session. India, however, had reservations as to whether this was the most appropriate way in which to proceed, stating that it would be preferable for the Commission to extend by one year the mandate conferred upon the Secretary-General rather than transferring that mandate to an independent expert.<sup>27</sup> In the search for consensus, Austria reintroduced the draft resolution which now requested the Secretary-General to designate a 'representative' to seek views and information from all governments on the human rights issues related to internally displaced persons, including an examination of existing international human rights, humanitarian and refugee law and standards and their applicability to the protection of and assistance to internally displaced persons.<sup>28</sup> It also encouraged the Secretary-General to seek also views and information from the specialised agencies, relevant United Nations organs and experts in all regions on these issues and to present a comprehensive study to the Commission at its next session, identifying existing laws and mechanisms and

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<sup>24</sup> Ibid., at para.22.

<sup>25</sup> *Written statement submitted by the Refugee Policy Group, a non-governmental organisation in consultative status (category II)*. E/CN.4/1992/NGO/21 (1992).

<sup>26</sup> *Summary record of the 35<sup>th</sup> meeting*. E/CN.4/1992/SR.35 (1992), at para.12.

<sup>27</sup> *Summary record of the 54<sup>th</sup> meeting*. E/CN.4/1992/SR.54 (1992), at para.48.

<sup>28</sup> CHR res.1992/73 (1992).

alternatives for addressing the protection needs not adequately covered by existing instruments. As such, the key elements necessary for taking the issue forward were maintained. The resolution was adopted by consensus by the Commission.

## **1.2 Appointment of the Representative of the Secretary-General**

In July 1992, and following intensive consultations with NGOs, Francis Deng of the Sudan was appointed by then Secretary-General Boutros-Ghali as his Representative on Internally Displaced Persons. Deng, a senior research fellow at the Brookings Institution in Washington DC and a participant in the June 1991 Washington conference, was considered appropriate for the post in several respects. His academic credentials were impressive, having held teaching and research posts in the Sudan and the United States and having written about human rights issues and served in the United Nations Human Rights Division. Furthermore, as a former diplomat and former Minister of State for Foreign Affairs of the Sudan he was considered to have appropriate diplomatic and governmental experience. Political sensitivities required that the post go to an African and preferably one from a country where internal displacement was an issue. As a descendant of a leading family of the Sudan's Dinka people who have suffered massive displacement from civil war, Deng would, as Boutros-Ghali put it, 'know what the problem is all about'.<sup>29</sup> For the Western Group Deng was seen as a safe pair of hands, given his origins in the Christian South of the Sudan and his academic and political connections with the United States.

Deng embarked upon preparing the comprehensive study, sending a questionnaire to all governments, organisations and agencies specified in the resolution. In addition, Deng undertook consultations outside the United Nations framework with a number of NGOs and with experts from the Brookings Institution and the RPG, both of which provided funding for his consultations and organised working groups for further consultations. Deng also requested the Harvard Law School Human Rights Programme and the Yale Law School Schell Centre for Human Rights to jointly draft an analysis of existing legal regimes pertinent to internally displaced persons and proposals for new institutional arrangements.

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<sup>29</sup> Cited in D.A. Korn, *Exodus within Borders: An Introduction to the Crisis of Internal Displacement* (1998) 6.

The comprehensive study was submitted to the Commission in 1993. On the question of legal standards, it noted a tension between those who felt that that existing law provided adequate coverage for the rights of the internally displaced and those who advocated a new regime. According to the report: 'Both are motivated by the same policy considerations. Those who consider the present law adequate want to strengthen its protection by reaffirming it and focusing attention on implementation and enforcement mechanisms.' Those advocating a new regime 'are particularly concerned that the internally displaced often suffer unusual hardships, deprivations and gross violations of human rights which require special attention and remedial measures.' Navigating between the two, the Representative concluded that it would be useful to prepare a compilation and analysis of relevant international standards which would include a commentary on the implications of these standards, the extent to which they address the problems faced by internally displaced persons, and practical proposals for their implementation. It was considered that such a compilation 'would be of great practical value to Governments and international bodies' and once completed, the question of what additional standards specifically concerning internally displaced persons are needed could then be addressed.<sup>30</sup>

As concerns the institutional aspect of the issue, the study noted the absence of a single organisation within the United Nations system with specific responsibility for the internally displaced and suggested that the issue be added to the mandate of an existing agency or that an equivalent body be established for the internally displaced.<sup>31</sup> Until this issue was resolved, it recommended that those United Nations agencies whose mandates were relevant to the internally displaced should consider establishing units to focus on the problem. Protection, however, would still need to be addressed by a human rights mechanism appointed by the Commission. As to the form such a mechanism should take - representative of the Secretary-General, Special Rapporteur, Independent Expert, or Working Group of the Commission - that of representative of the Secretary-General was considered better suited to the task 'because the needs and challenges associated with the internally displaced cut across so many operational and organisational lines within the United

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<sup>30</sup> *Comprehensive study prepared by Mr. Francis M. Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to Commission on Human Rights resolution 1992/73. E/CN.4/1993/35 (1993), at paras.55-88.*

<sup>31</sup> *Ibid.*, at para.285.

Nations system ... such a mechanism, to be most effective, would benefit from an institutional association with the office of the Secretary-General'.<sup>32</sup>

Russia considered the comprehensive study to be a 'commendable report' containing 'very pertinent recommendations'.<sup>33</sup> Norway recommended the continuation of the mandate of the Representative;<sup>34</sup> and Austria was 'strongly of the opinion that the Representative's mandate should be extended, to enable him to continue the work he had so competently begun'.<sup>35</sup> Others were more cautious. Underlining the tension between international protection for the internally displaced and state sovereignty, the Sudan stated that human rights protection was only part of the problem of the internally displaced. Such cases as Bosnia and Herzegovina or Somalia should not be confused with other situations, where national governments were providing protection and simply required material assistance from the international community - which, apparently, was the case in the Sudan.<sup>36</sup> Sri Lanka and India stated that internal displacement has dimensions that go beyond the specific issues of human rights and therefore recommended caution. Both delegations stressed that the causes of displacement had also to be considered in the context of environmental and socio-economic factors. Also, emphasis only on human rights was limited because it did not usually highlight 'terrorist activities' by non-state actors.<sup>37</sup> India stated that further work by the Commission on this subject should be based on the 'actual experience of Member States that have been suffering from internal displacements for a variety of reasons'.<sup>38</sup>

Consultations between Deng and the representative of Austria ensured that the subsequent draft resolution reflected those elements of the report which were necessary for taking the issue forward. Noting that the Representative 'has identified a number of tasks requiring further attention and study, including the compilation of existing rules and norms and the question of general guiding principles to govern the treatment of internally displaced persons', the Commission in resolution 1993/95 requested the Secretary-General to mandate his representative for a further two years 'to continue his work aimed at a better

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<sup>32</sup> Ibid., at para.128.

<sup>33</sup> *Summary record of the 38<sup>th</sup> meeting*. E/CN.4/1993/SR.38 (1993), at para.73.

<sup>34</sup> See F. Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993) 142.

<sup>35</sup> *Summary record of the 40<sup>th</sup> meeting*. E/CN.4/1993/SR.40 (1993), at paras.82-83.

<sup>36</sup> Ibid., at para.57.

<sup>37</sup> Deng, note 34 above, at 144-145.

<sup>38</sup> Ibid., at 145.

understanding of the general problems faced by internally displaced persons and their possible long-term solutions, with a view to identifying, where required, ways and means of improving protection for and assistance to internally displaced persons’.

## **2. Developing the Normative Framework**

Commission on Human Rights resolution 1993/95 effectively opened the way for the Representative to begin the process of developing a normative framework for the internally displaced, resulting in the elaboration of the Guiding Principles.

### **2.1 Compilation and Analysis of Legal Norms**

Beginning in 1994, the Representative assembled a team of experts in international law who, working under his direction, embarked upon the preparation of a two-part compilation and analysis of legal norms which was to form the basis for the Guiding Principles.

The first part of the compilation examined the relevant provisions of international law once people have been displaced.<sup>39</sup> On the basis of information acquired from field reports, other relevant studies and discussions with experts, the compilation identified a broad spectrum of needs of internally displaced persons in regard to equality and non-discrimination, life and personal security, subsistence, movement, personal identification, documentation and registration, property, family and community values, self-reliance, and humanitarian assistance, and analysed the extent to which these needs are met by international human rights law, international humanitarian law and refugee law by analogy. The compilation found that while existing law covers many aspects of relevance to the situation of internally displaced persons, there nonetheless remains gaps and grey areas where the law fails to provide sufficient protection (see below).<sup>40</sup> It concluded, therefore, that where the needs of the internally displaced are not sufficiently protected by international law, it is important ‘to restate general principles of protection in more specific detail’, and

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<sup>39</sup> *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57. Compilation and analysis of legal norms. E/CN.4/1996/52/Add.2 (1995).*

<sup>40</sup> *Ibid.*, at para.410

address actual gaps in protection in 'a future international instrument on the protection of internally displaced persons'.<sup>41</sup>

While the primary focus of the first part of the compilation is on those guarantees relevant to both situations of internal displacement as well as return, it acknowledges that 'in order to achieve comprehensiveness in the elaboration of the legal framework that relates to displacement' it is necessary to discuss the legal norms relevant to protection from displacement and to a right not to be displaced.<sup>42</sup> Thus, a separate study on the legal aspects relating to protection against arbitrary displacement was undertaken in 1996. This study, the second part of the compilation and analysis, found that although many provisions in international law point to a general rule according to which forced displacement may be undertaken only exceptionally, on a non-discriminatory basis and not arbitrarily imposed, this protection is largely implicit. It concluded, therefore, that the legal basis for providing protection prior to displacement could be strengthened significantly by articulating a right not to be arbitrarily displaced.<sup>43</sup>

## **2.2 The Guiding Principles on Internal Displacement**

Following the submission of the first part of the compilation to the Commission in 1996, the Representative and the legal team began to develop, on the basis of the compilation and at the request of the Commission and subsequently the General Assembly, a comprehensive normative framework of protection and assistance for the internally displaced. This resulted in the elaboration of a set of guiding principles which were finalised at an expert consultation in January 1998 and submitted to the Commission later that year as the Guiding Principles on Internal Displacement.<sup>44</sup>

The 30 principles aim to 'address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection'.<sup>45</sup> The

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<sup>41</sup> Ibid., at para.413.

<sup>42</sup> Ibid., at para.11.

<sup>43</sup> *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Addendum. Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement.* E/CN.4/1998/53/Add.1 (1998), at paras.84-88.

<sup>44</sup> *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Addendum. Guiding Principles on Internal Displacement.* E/CN.4/1998/53/Add.2 (1998). The Guiding Principles are reproduced in the appendix to this thesis.

<sup>45</sup> Ibid., at para.9.

Principles are organised into five sections and apply to the different phases of displacement. Following a section of general principles, there are sections containing principles relating to protection from arbitrary displacement, protection and assistance during displacement, principles relating to humanitarian assistance, and to return or resettlement and reintegration.

The stated scope and purpose of the Principles is to provide guidance to the Representative in implementing his mandate; to States when confronting situations of displacement; to all other authorities, groups and persons in their relations with the internally displaced; and finally, to intergovernmental and non-governmental organisations when addressing internal displacement.<sup>46</sup> In essence, the Principles are intended as a 'persuasive statement that should provide not only practical guidance, but also an instrument for public policy education and consciousness-raising', as well as having the potential to perform a preventive function.<sup>47</sup>

### **3. The Guiding Principles in Context – Soft Law-Making through Restatement**

To a certain extent the Representative's efforts in developing the normative framework are not particularly unique or innovative in the sense that the Guiding Principles may be regarded as falling within the increasing corpus of 'soft law' or 'non-binding' instruments.<sup>48</sup> The international community has become increasingly

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<sup>46</sup> Ibid., 'Introduction: Scope and Purpose', at para.3

<sup>47</sup> Ibid.

<sup>48</sup> 'Soft' law, a term purportedly coined by Lord McNair, refers to instruments and norms that do not give rise to binding obligations but which have certain legal effects or significance nonetheless. For example, Schachter describes soft law-making as 'the production of norms that do not purport to be law.' Tammes states that soft law 'is intended to indicate phenomena that have the characteristics of 'law' in their directive effect to influence the will and restrict the liberty of those to whom the 'soft law' is addressed. On the other hand, it should be pointed out when referring to the term, that something is missing in the legal or binding nature of law as we know it from daily life, and even international life.' Similarly, Baxter refers to soft law instruments as those which 'deliberately do not create legal obligations but which are intended to create pressures and to influence the conduct of States and to set the development of international law in new courses'. Schachter, 'Recent Trends in International Law-Making', 12 *Australian YB Int'l. L.* (1992) 11; Tammes, 'Soft Law' in E. Radice Arbor (ed), *Essays on International Comparative Law in Honour of Judge Erades* (1983) 187; and Baxter, 'International Law in Her Infinite Variety', 29 *ICLQ* (1980) 557. See further, 'A Hard Look at Soft Law', *ASIL Proc.* (1988) 371; Szasz, 'General Law-Making Processes', in O. Schachter and C. Joyner (eds), *United Nations Legal Order*, Vol.1 (1995) 45; 'To what Extent are the Traditional Categories of *Lex Lata* and *Lex Ferenda* still Viable?', in A. Cassese and J.H.H Weiler, *Change and Stability in International Law-Making* (1988)



reliant on the formulation of soft law standards, the adoption of such instruments being considered an 'appropriate, and often, welcome product of international negotiations and the deliberations of international collective bodies'.<sup>49</sup> As Christine Chinkin observes:

'The inadequacies of treaties and custom as modes of international law-making have become increasingly exposed. The broadening subject matter of international regulation, the claims by and against non-state actors, and the global challenges posed by, *inter alia*, environmental degradation, decreasing natural resources, sustainable development, human rights violations, and disarmament have created an international setting that requires diversified forms and levels of law-making.'<sup>50</sup>

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66; and Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850.

<sup>49</sup> Schachter, *ibid*, at 12. Others are somewhat less enthusiastic. Arangio-Ruiz, for example, has condemned states for taking advantage of the concept, for using it 'for their own public opinion and "international" public opinion and for other States too, in order to make peoples and States feel that certain problems are being taken care of at an international level while they are in fact not being taken care of at all.' While conceding that in certain instances the adoption of soft law may represent a first step towards the possible adoption - 'through further adequate steps' - of hard law, this does not, however, 'justify recourse to soft law devices on the part of States in order to cover up unwillingness to achieve more substantial law-making results'. Comments in Cassese and Weiler, *ibid*, at 82.

Danilenko cautions against the use of the soft law approach lest one call into question the foundations of international law: '[B]y undermining the established notion of law as a body of rules having a special obligatory quality deriving from legal validity, [the soft law] approach presents a fundamental challenge to the entire international legal structure. There is a serious danger that the normative confusion and uncertainty resulting from definitional manipulations will only erode the concept of legal obligation and weaken the authority of law within the international community.' G.M. Danilenko, *Law-Making in the International Community* (1993) 20-21.

In 1996, Jan Klabbbers called for the 'redundancy of soft law', criticising the 'shaky presumptions' on which it is said to rest, the apparently 'meagre support' in both state practice and judicial practice, and arguing that it is not even necessary to resort to the concept to 'do justice to political considerations'. Klabbbers, 'The Redundancy of Soft Law', 65 *Nordic J. Int'l. L.* (1996) 167-182. Two years later, the same author was somewhat more alarmist warning of the 'undesirability of soft law', arguing that the very invention of the soft law concept 'can be regarded as a ploy by the powers that be to strengthen their own position' to the detriment of ordinary citizens; that the idea of soft law 'plays a trick with images, inviting us to think that a rule at the moment of its creation is innocuous because, after all, it is soft, but as soon as we turn our back we find the norm to be somehow transmogrified (the vocabulary of cartoon characters Calvin and Hobbes seems oddly fitting) into something which is either not law at all or, as is more often the case, turns out to be as hard as hard law itself.' Klabbbers, 'The Undesirability of Soft Law', 67 *Nordic J. Int'l L.* (1998) 391.

<sup>50</sup> Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 22. See also Wellens and Borchardt, 'Soft Law in European Community Law', 14 *ELR* (1989) 269: 'The international lawyer finds himself facing an unprecedented proliferation of international non-conventional instruments which have been brought about by States and international organisations and which are intended to have, or are having, the effect of influencing the conduct of States, international organisations or individuals in a

With regard to the promotion and protection of human rights, the majority of human rights instruments adopted under the auspices of the United Nations actually fall within the category of soft law instruments. Coming under a variety of titles such as declarations, standard minimum rules, guidelines, codes of conduct and basic principles, such instruments are for the most part adopted or endorsed by a resolution of a United Nations organ, generally, though not exclusively, the General Assembly and as such constitute non-binding 'recommendations'.<sup>51</sup>

Non-binding texts are often adopted as a pre-cursor to the conclusion of formal treaties. The soft law stage sets out general principles while the subsequent hard law stage defines these rights and the obligations inherent in order to realise them, as well their limitations and restrictions, in more specific detail.<sup>52</sup> The most obvious example of this is the adoption of the Universal Declaration of Human Rights in 1948, followed by the adoption and opening for signature and ratification of the two International Covenants in 1966. Soft or non-binding instruments are also used to conclude the increasingly frequent global conferences convened by the United

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permissive, prohibitive or prescriptive way.' Similarly see, Koh, 'A World Transformed', 20 *Yale J. Int'l L.* (1995) ix, who refers to 'a brave new world of international law' where 'transnational actors, sources of law, allocation of decision function and modes of regulation have all mutated into fascinating hybrid forms. International law now comprises a complex blend of customary, positive, declarative and soft law'.

<sup>51</sup> Examples of soft human rights instruments are numerous though the following suffice as a representative sample: the Universal Declaration of Human Rights, adopted and proclaimed by GA res.217 A (III) (1948), the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by GA res.1904 (XVIII) (1963), Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, GA res.2018 (XX) (1965), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), recommended for adoption by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) and adopted by GA res.40/33 (1985), Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990), the Code of Conduct for Law Enforcement Officials, adopted by GA res.34/169 (1979), the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) and endorsed by GA res.40/32 (1985) and 40/146 (1985), and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted by GA res.48/96 (1993).

In legal terms there is no real distinction between the various forms of recommendations although according to a 1962 memorandum of the Office of Legal Affairs, the term 'declaration' is considered to be 'suitable for rare occasions when principles of great and lasting importance are being enunciated', for example the Universal Declaration. The memorandum continues, 'in view of the greater solemnity and significance of a "declaration" it may be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it.' See *Official records of the Economic and Social Council, thirty-fourth session, supplement no. 8*. E/3616/Rev.1, at para.105.

<sup>52</sup> Though as noted in the previous chapter, in some instances no legally binding instrument has followed due to lack of agreement, such as with regard to religious discrimination.

Nations. For example, the United Nations human rights conferences at Teheran in 1968<sup>53</sup> and Vienna in 1993 resulted in declarations and, in the case of the latter, a programme of action.<sup>54</sup> Moreover, non-binding instruments provide the only detailed guidance in many areas of criminal justice, emanating for the most part from meetings of the United Nations Congresses on Crime Prevention and Treatment of Offenders as well as the Commission on Human Rights.<sup>55</sup>

Dinah Shelton advances several reasons to explain the choice of soft law over hard law. In particular, Shelton observes that the emergence of soft law may be accounted for by the fact that it can generally be adopted more rapidly because it is non-binding – that is to say that it may substitute for hard law ‘when no agreement on hard law can be achieved or when recourse to hard law form would be ineffective (less progressive norms or less likelihood they would be acceptable in the national political arena).’<sup>56</sup> Furthermore, soft law-making allows for more active participation of non-state actors, permitting them to play a role which is possible only rarely in traditional law-making processes.<sup>57</sup> As will be shown below, while both these reasons figure prominently in the Representative’s approach to developing the normative framework, they do so in a far more complex and fundamental manner than is perhaps immediately apparent.

Shelton also distinguishes between two types of human rights soft law, primary and secondary. Primary soft law refers to those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organisation. Such an instrument may declare new norms, often as an intended precursor to the adoption of a later treaty, or it may reaffirm or further elaborate previously accepted general or vague norms found in binding or non-binding texts.<sup>58</sup> Secondary soft law on the other hand, refers

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<sup>53</sup> *The Proclamation of Teheran*, proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968. In United Nations, *A Compilation of International Instruments*, Vol. 1, First Part (1994) 51.

<sup>54</sup> *Vienna Declaration and Programme of Action*, A/CONF.157/24 (1993).

<sup>55</sup> See note 51 above, and generally, R.S. Clark, *The United Nations Crime Prevention and Criminal Justice Programme: Formulation of Standards and Efforts at their Implementation* (1994); N.S. Rodley, *The Treatment of Prisoners Under International Law* (1999); and Toman, ‘Quasi-Legal Standards and Guidelines for Protecting Human Rights’, in H. Hannum (ed), *Guide to International Human Rights Practice* (1992) 192-210.

<sup>56</sup> Shelton, ‘Law, Non-Law and the Problem of “Soft Law”’, in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 13.

<sup>57</sup> *Ibid.*

<sup>58</sup> Shelton, ‘Commentary and Conclusions’, in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 450.

to the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organisations applying primary norms. It would seem reasonable to conclude that the Guiding Principles fall within the first of these categories. Indeed, as Walter Kälin has remarked, the Guiding Principles

restate in more detail many of those existing legal provisions which respond to the specific needs of internally displaced persons and spell them out in order to facilitate their application in situations of internal displacement. They also clarify aspects of the protection of internally displaced persons where present international law contains certain grey areas or even gaps. For these reasons the introductory part of the Guiding Principles stresses that they reflect and are consistent with international human rights and humanitarian law.<sup>59</sup>

This is in many respects a key feature, perhaps even the key feature, of the Representative's approach to developing the normative framework: that it was essentially an exercise in what might be termed soft law-making through restatement. That is to say that the rationale behind the Guiding Principles is not the creation of 'brand new' law so to speak but, as the passage from Kälin indicates, the application of existing general principles and norms to the specific context of internal displacement. In those cases where the needs of the internally displaced are not sufficiently protected by international law, the Principles seek to clarify the grey areas by restating general principles of protection in more specific detail and to address the gaps in cases where no explicit norms exist to meet the needs of the internally displaced. The outcome is a broad and progressive restatement of international law which details more precisely and in a more accessible and readable format, the relevant provisions of human rights and humanitarian law as they apply to the internally displaced.

### **3.1 Clarifying the Grey Areas**

As indicated above, the compilation found that while existing law covers many aspects of relevance to the situation of internally displaced persons, there

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<sup>59</sup> Walter Kälin, 'Introduction to the Guiding Principles on Internal Displacement'. Paper presented at the Regional Workshop on Internal Displacement in the South Caucasus, 10-12 May 2000. On file with the author.

nonetheless remains two areas where the law fails to provide sufficient protection.<sup>60</sup> The first of these concerns situations where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm in areas of particular need to internally displaced persons. In this regard the compilation states that although it is possible to infer specific legal rights from existing general norms, the protection of internally displaced persons would be strengthened by spelling out these specific guarantees in the context of internal displacement.<sup>61</sup> The compilation recommended restatement of existing general norms in relation to discrimination, the protection of life, gender-specific violence, detention, shielding, forced recruitment, subsistence needs, medical care, free movement, family related needs, the use of one's own language, religion, work, education, association, political participation and the need for access to international assistance - all of which are duly provided for in the Guiding Principles.

### **3.1.1 Gender-Specific Violence**

To take gender-specific violence, for example, drawing upon the relevant provisions of international and regional human rights treaties, humanitarian law, as well as on the practice of the CEDAW, the Human Rights Committee and the United Nations Special Rapporteur on Torture,<sup>62</sup> the compilation states that in principle, international law affords adequate protection from acts of gender-specific violence against internally displaced persons. However, it notes that 'many of these guarantees, especially their bearing on internally displaced persons, need to be highlighted and further detailed in a future international instrument'.<sup>63</sup>

Indeed, although provisions exist prohibiting gender-specific violence, their actual application, especially in relation to internally displaced persons, is in some cases rather vague. In situations of non-international armed conflict for example, Common Article 3 prohibits 'any adverse distinction founded on ... sex' in its guarantee of humane treatment in all circumstances of non-international armed conflict. Similarly, Article 2(1) of Protocol II to the Geneva Conventions of 1949 contains the same provision in relation to the application of the Protocol. According to the compilation, it can be argued that such provisions 'encompass all gender-specific violence

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<sup>60</sup> E/CN.4/1996/52/Add.2, at para.410

<sup>61</sup> Ibid., at para.411.

<sup>62</sup> Ibid., at paras.127-142.

<sup>63</sup> Ibid., at para.142.

because the core of such conduct is sexual distinction'.<sup>64</sup> However, it continues that the protection of internally displaced persons in these respects would clearly be enhanced by specifying this in a single international instrument rather than having to infer it from a number of sources. Furthermore, although Common Article 3 does not explicitly cite any particular acts of gender-specific violence, the compilation claims that it could be inferred that its general prohibitions in Article 3(1)(a) and 3(1)(c) against 'outrages upon personal dignity, in particular humiliating and degrading treatment' and 'violence to life and person, in particular ... mutilation, cruel treatment and torture', encompass certain forms of gender-specific violence, including rape.<sup>65</sup> This is especially so given that Article 4(2)(e) of Protocol II explicitly prohibits 'outrages upon personal dignity' including, 'rape, enforced prostitution and any form of indecent assault'. According to the compilation, '[s]ince Protocol II elaborates on and clarifies Common Article 3, its explicit proscription of rape and other kinds of sexual and physical violence should be respected by the Parties to all internal conflicts.'<sup>66</sup>

With these considerations in mind, Principle 11(2) seeks to clarify the situation providing that internally displaced persons, whether or not their liberty has been restricted,

... shall be protected in particular against:

- (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;
- (b) Slavery or any contemporary form of slavery such as sale into marriage, sexual exploitation ...;

...

Threats and incitement to commit any of the foregoing acts shall be prohibited.

Also of note in this regard is Principle 19(2), which provides for special attention to be paid to the health needs of women, including access to female health care providers and services, including 'counselling for victims of sexual and other abuses'.<sup>67</sup>

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<sup>64</sup> Ibid., at para.135.

<sup>65</sup> Ibid., at para.136.

<sup>66</sup> Ibid.

<sup>67</sup> Also Principle 4(2) provides that '[c]ertain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female

### 3.1.2 Discrimination

Another, and perhaps more innovative clarification of a general principle concerns discrimination. The compilation observes that internally displaced persons, 'often living in alien surroundings, deprived of their security, property and social status, are particularly exposed and vulnerable to discriminatory treatment'.<sup>68</sup> However, an explicit prohibition of discrimination against the internally displaced because of their being displaced, does not exist in human rights law.<sup>69</sup> In this regard the compilation notes that several international and regional human rights treaties have clauses requiring States Parties to respect and ensure the rights and freedoms provided for in those instruments without discrimination. Of these, Article 26 of the ICCPR is held to be the most far-reaching guarantee, providing that

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.<sup>70</sup>

According to the compilation, the term 'other status' was meant to be interpreted broadly and has come to include 'nationality and disability and reasonably includes youth and old-age'.<sup>71</sup> Consequently, it asserts that '[n]on-discrimination clauses thus appear to ban discrimination against internally displaced persons based on their status as such'<sup>72</sup> and calls for an explicit statement to this effect in a future international instrument on internally displaced persons.<sup>73</sup> Thus, according to Principle 1(1)

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heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs'.

<sup>68</sup> E/CN.4/1996/52/Add.2, at para.48.

<sup>69</sup> Ibid., at para.49.

<sup>70</sup> Emphasis added. Similar non-discrimination clauses employing the term 'other status' can be found in Art.7 of the Universal Declaration of Human Rights and Art.2(2) ICESCR.

<sup>71</sup> E/CN.4/1996/52/Add.2, at para.52.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid., at para.65.

[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.

This is clearly a necessary assumption given that the internally displaced are indeed at risk of discriminatory treatment on account of their being displaced.<sup>74</sup> However, it might be argued that applying the term 'other status' to the internally displaced is somewhat progressive. The *travaux préparatoires* of the ICCPR do suggest a broad interpretation of the term 'other status'<sup>75</sup> and the Human Rights Committee considers the term to include nationality.<sup>76</sup> However, this is the only ground that the Committee has specifically enumerated as constituting 'other status' and violations of the prohibition of discrimination have been found primarily with regard to gender-specific distinctions. Distinctions between married and unmarried couples, between conscripted soldiers and civilians, between soldiers and conscientious objectors or between pupils in public and private schools were not considered to be discriminatory in the relevant cases.<sup>77</sup> As Nowak observes, however, the decisive question which is ultimately subject to resolution only on a case-by-case basis, by weighing all the relevant circumstances, is 'whether a specific distinction between various persons or groups of persons [between internally and non-displaced persons] is to be considered discriminatory. This is the case only when the Parties concerned find themselves in a comparable situation and when the distinction is based on unreasonable and subjective criteria'.<sup>78</sup>

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<sup>74</sup> See, for example, S. Bagshaw, *Internally Displaced Persons and Political Participation – The OSCE Region*, Brookings Institution Project on Internal Displacement, Occasional Paper (September 2000) detailing discriminatory practices against internally displaced persons in the exercise of voting rights in a number of OSCE participating States.

<sup>75</sup> According to Marc Bossuyt, proposals to add 'association with minority groups', 'economic or other opinion' and 'educational attainment' to the enumerated grounds of discrimination 'were thought to be unnecessary since they were deemed adequately covered by the expressions 'discrimination on any ground' and 'other status'. M. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1986) 486.

<sup>76</sup> See *Decision of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights - Thirty-fifth session concerning Communication No. 196/1985*. CCPR/C/35/D/196/1985 (1989), at paras.9.4, 9.5 and 10.

<sup>77</sup> M. Nowak, *CCPR Commentary* (1993) 473.

<sup>78</sup> *Ibid.*, at 473-474. See Bagshaw, note 74 above, for cases of discrimination against displaced persons in the exercise of voting rights which would without a doubt meet Nowak's test of 'unreasonable and subjective criteria'. In fact, the discriminatory application of voting rights against displaced persons in Georgia was brought to the attention of the pre-sessional working group of the Human Rights Committee in preparation for the Committee's consideration of the periodic report of Georgia in 2002. However, prior to the Committee's consideration of the report the Government amended the law accordingly in order, in its own words, to bring it into line with the Guiding Principles'. See statement of the representative



### 3.1.3 International Assistance

Perhaps the most significant example of clarification of existing general principles is found in relation to access to humanitarian assistance, in particular from the international community; an issue of undeniable importance to the internally displaced. Indeed, as the compilation observes, '[o]ne of the most acute needs of internally displaced persons is safe access to those essentials which are indispensable to their survival and to a minimum standard of living. Thus the possibility to seek and receive humanitarian assistance is, itself, critical to the ability to meet the needs of internally displaced persons.'<sup>79</sup> To this end, the compilation notes that

whereas existing international law recognises the right of internally displaced persons to request and receive protection and assistance from their Government and, to a certain extent, the right of international actors to offer humanitarian services on their behalf to affected Governments and authorities, a corresponding duty of States to accept offers of assistance by humanitarian organisations and to grant and facilitate free passage of relief has not been explicitly recognised.<sup>80</sup>

It observes further that the international community has been 'cautious to recognise a duty of a State to accept offers of humanitarian assistance.'<sup>81</sup> Resolutions of the General Assembly have reaffirmed the primary responsibility of States to assist victims of natural disasters and similar emergencies that occur within their territory.<sup>82</sup> These resolutions also invite States to facilitate the work of international and non-governmental organisations in implementing humanitarian assistance, in particular regarding the supply of food, medicines and health care.<sup>83</sup> Consequently, the compilation holds that they 'implicitly recognise the right, under the international law of States, of international organisations and non-governmental organisations to offer humanitarian assistance to other States' in situations of natural disasters and similar

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of Georgia to the fifty-seventh session of the Commission on Human Rights. Quoted in *Report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2000/53*. E/CN.4/2001/5 (2001).

<sup>79</sup> E/CN.4/1996/52/Add.2, para. 359

<sup>80</sup> Ibid., at para.415(q).

<sup>81</sup> Ibid., at para.366.

<sup>82</sup> See GA res.43/131 (1989) and 45/100 (1990).

<sup>83</sup> Ibid.

emergencies.<sup>84</sup> However, these resolutions and also the subsequent resolution 46/182 concerning the strengthening of the coordination of humanitarian emergency assistance of the United Nations reaffirm that the right of external actors to provide such assistance is based on the consent of the State concerned.<sup>85</sup>

Despite the absence of an explicit obligation on the part of States to accept offers of international assistance, the compilation maintains that the right of internally displaced persons to request and receive protection and assistance from their government and the duty of the latter to provide such services, 'necessarily flow from the essential nature of the international law of human rights as enshrined in the Charter ..., the International Bill of Human Rights, and other universal and regional instruments.'<sup>86</sup> According to the compilation, Article 1(3) of the Charter imposes a duty on States members of the United Nations to cooperate 'in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all'. The compilation argues that this duty to cooperate 'is referenced as the leading basis' for General Assembly resolutions 43/131 and 45/100 reaffirming the primary responsibility of States to provide assistance to victims of natural disasters and similar emergencies that occur within their territories.<sup>87</sup> For the compilation, '[t]his duty implies a corollary obligation of States to receive international assistance when offered and needed'.<sup>88</sup>

The compilation also draws upon the right to life as supporting the argument as to the existence of an obligation on States to receive international assistance. The right to life is the most fundamental and universally recognized right<sup>89</sup> and requires that 'States adopt positive measures if necessary for its protection'.<sup>90</sup> Consequently, the compilation asserts that a necessary implication of States' recognition of the right to life is the right of internally displaced persons to seek and receive protection and life-sustaining assistance. Accordingly, 'the Government of a State which

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<sup>84</sup> E/CN.4/1996/52/Add.2, at para.366.

<sup>85</sup> The 'guiding principles', annexed to GA res. 46/182, state *inter alia* that, '[t]he sovereignty, territorial integrity and national unity of States must be respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country'.

<sup>86</sup> E/CN.4/1996/52/Add.2, at para.361.

<sup>87</sup> *Ibid.*, at para.362.

<sup>88</sup> *Ibid.*

<sup>89</sup> See Art.3 UDHR, Art.6(1) ICCPR, Art.I American Declaration, Art.4(1) ACHR, Art.2 ECHR, Art.4 African Charter, and Art.6(1) Convention on the Rights of the Child.

withholds such assistance from its internally displaced citizens should be seen as violating any of the principle universal or regional human rights instruments, to which it is a party, that guarantee the right to life'.<sup>91</sup>

A duty to accept offers of international assistance is also held to stem from provisions of the ICESCR. According to Article 2(1) of the ICESCR, a State party is obliged to 'take steps, individually and through international assistance and cooperation ... to the maximum of its available resources, with a view to achieving the full realization of the rights recognized' in the Covenant. In the context of the ICESCR, the maximum of a State's available resources is held to include 'the resources existing within a State and *those available from the international community through international cooperation and assistance*'.<sup>92</sup> Furthermore, according to Article 11, the States Parties also recognize the right of everyone to an adequate standard of living, including adequate food, clothing and housing. The States Parties undertake to take appropriate steps to realize this right and further recognize in this regard the 'essential importance of *international cooperation* based on free consent'.<sup>93</sup> Ultimately, the Committee on Economic Social and Cultural Rights holds that 'in accordance with Articles 55 and 56 of the United Nations Charter [concerning the promotion of respect for, and observance of human rights], with well-established principles of international law, and with provisions of the Covenant itself, international cooperation for ... the realization of economic, social and cultural rights is an obligation of all States'.<sup>94</sup> To this end, the compilation contends that State Parties to the ICESCR 'have a duty to at least refrain from unreasonably denying offers of international assistance in cases of imminent humanitarian problems seriously affecting the subsistence needs of internally displaced persons and, perhaps, an obligation to accept reasonable offers'.<sup>95</sup>

Support for the existence of a principle requiring that States accept international assistance is provided by the compilation also by way of an analysis of Security Council practice. The compilation argues that on the basis of resolutions concerning Northern Iraq, Azerbaijan and Bosnia and Herzegovina, it is possible to conclude that in situations of both non-international and international armed conflict

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<sup>90</sup> E/CN.4/1996/52/Add.2, at para.363.

<sup>91</sup> Ibid.

<sup>92</sup> CESCR, *General Comment No. 3*. Emphasis added.

<sup>93</sup> E/CN.4/1996/52/Add.2, at para.364. Emphasis added.

<sup>94</sup> CESCR, note 92 above.

<sup>95</sup> E/CN.4/1996/52/Add.2, at para.365.

threatening peace and security in a region, States are obliged to permit United Nations agencies and international humanitarian organisations access to civilians, including internally displaced persons in need of humanitarian relief, if the State concerned is unable or unwilling to provide such assistance.<sup>96</sup>

'A duty to refrain from unreasonably denying offers of international assistance' and 'an obligation to accept reasonable offers', are essentially two sides of the same coin, the essence being that internally displaced persons in need of international assistance should not be arbitrarily denied such assistance when it is offered. Hence the compilation's call for the 'explicit recognition' of this duty in a future international instrument on internally displaced persons. To this end Principle 25 provides that

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lie with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto *shall not be arbitrarily withheld*, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned *shall grant and facilitate the free passage of humanitarian assistance* and grant persons engaged in the provision of such assistance *rapid and unimpeded access* to the internally displaced [Emphasis added].

Reflecting the aforementioned provisions, it is not the case that States 'should' not arbitrarily withhold consent but that they 'shall' not withhold such consent and moreover, that they 'shall' grant and facilitate free passage of humanitarian assistance and access to the internally displaced.

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<sup>96</sup> Ibid., para.389. With regard to Northern Iraq for example, SC res.688 (1991) 'reaffirmed' the sovereignty, territorial integrity and political independence of Iraq but also 'insisted' that Iraq 'allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations'. Alternatively, in para.3 of SC res.859 (1993), concerning Bosnia and Herzegovina, the Security Council demanded 'that all concerned facilitate the unhindered flow of humanitarian assistance, including the provision of food, water, electricity, fuel and

### 3.2 Addressing the Gaps

As noted above, in addition to situations where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm in areas of particular need to internally displaced persons, the compilation also found that international law failed to provide sufficient protection to the internally displaced in cases where no explicit norms exist to address their needs. It may be that a norm exists in human rights law but not in humanitarian law and vice versa. The compilation identified a number of cases of this sort, notably in regard to disappearances, the missing and the dead, the use of landmines and like-devices, detention, needs for personal identification, documentation and registration, property-related needs and regarding relief workers and organizations.<sup>97</sup> According to the compilation, in cases such as these it is only possible to articulate rights by 'analogising' from existing provisions of law that apply only in limited situations or only to certain categories of persons such as children or refugees.<sup>98</sup> It recommended that cases of what it terms 'clear protection gaps', should be addressed in a future international instrument.<sup>99</sup> Consequently there are several provisions contained in the Principles which seek to address such gaps.

#### 3.2.1 *Disappearances*

With regard to disappearances for example, the compilation recommends that it be stated in a future international instrument that disappearances of internally displaced persons in any situation, including armed conflict, are prohibited and that this prohibition applies to all Parties to the conflict. The compilation observes that there is at present no 'explicit' proscription of enforced disappearance in any general human rights instrument, neither universal nor regional, nor in Common Article 3 or Protocol II in relation to non-international armed conflict, and the Fourth Geneva Convention and Protocol I in relation to inter-state armed conflict. The compilation notes that the practice is considered illegal by the General Assembly's 1992 Declaration on the Protection of All Persons from Enforced Disappearance<sup>100</sup> as well as the Vienna Declaration and Programme of Action, adopted by the 1993 World

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communications, in particular to the safe areas in Bosnia and Herzegovina' - which invariably contained internally displaced persons.

<sup>97</sup> E/CN.4/1996/52/Add.2, at para.416.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid., at para.413.

<sup>100</sup> GA res.133 (1992).

Conference on Human Rights.<sup>101</sup> However, neither of these declarations have binding force.<sup>102</sup>

In terms of an 'implicit' proscription of such a practice, the compilation notes that disappearances violate many fundamental guarantees recognized within international human rights and humanitarian law instruments. In this regard, the compilation refers to the practice of, *inter alia*, the Human Rights Committee. The Committee has held that the practice of disappearances will often contravene the right to life contained in Article 6(1) of the ICCPR.<sup>103</sup> Similarly, enforced disappearances are prohibited under humanitarian law to the extent that Common Article 3 prohibits violence to life and person, outrages upon personal dignity, and the passing of sentences and the carrying out of executions without due process. Also Articles 4, 5 and 6 of Protocol II contain provisions relating to humane treatment which could be reasonably considered as being violated by acts of forced disappearance.<sup>104</sup> Thus it may be held that enforced disappearances of internally displaced persons in any situation, including armed conflict and by any of the Parties to a conflict, are prohibited. What is required, and advocated by the compilation, is an explicit statement to that effect in a future international instrument. Thus Principle 10(1) provides:

Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:

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<sup>101</sup> See Section II, para.62.

<sup>102</sup> It should be noted that the Sub-Commission's sessional working group on the administration of justice has prepared a draft International Convention on the Protection of All Persons from Enforced Disappearance (E/CN.4/Sub.2/1998/19, annex), which was transmitted to the Commission by the Sub-Commission in its resolution 1998/25. In addition, enforced disappearance, as defined in the Rome Statute of the International Criminal Court, comes within the jurisdiction of the Court as crimes against humanity. See Art.7(1)(i) and (2)(d), *Rome Statute of the International Criminal Court*, A/CONF.183.9 (1998).

<sup>103</sup> The Committee has stated that 'States Parties should ... take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life'. Cited in E/CN.4/1996/52/Add.2, at para.95. In the case of Rafael Mojica, the Committee reaffirmed this view and concluded that the disappearance of Mr. Mojica constituted a violation of Art.6(1) of the Covenant. The Committee also held that by failing to ensure Mr. Mojica's right to liberty and security of the person, the Government concerned had also violated Art.9(1) of the ICCPR. The Committee has also stressed that '[a]ware of the nature of enforced or involuntary disappearances in many countries, [it] feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of Article 7', prohibiting torture and cruel, inhuman or degrading treatment. Cited in E/CN.4/1996/52/Add.2, at para.95.

<sup>104</sup> *Ibid.*, at paras.97-98.

...

(d) Enforced disappearances, including abduction or unacknowledged detention threatening or resulting in death.

Threats or incitement to commit any of the foregoing acts shall be prohibited.

### **3.2.2 Property Restitution and Compensation**

The first part of the compilation and analysis recognises that on return, internally displaced persons may find their homes occupied by other people and as such they require restitution of the property or compensation for its loss.<sup>105</sup> The compilation notes that under the domestic laws of States which enshrine private property rights, the authorities may have a legal obligation to protect such property from unlawful interference by third Parties and to restore property to rightful owners following a period of *de facto* dispossession.<sup>106</sup> However, in other States protection is not sufficient, especially in former socialist States where existing domestic legislation may raise difficulties *vis-à-vis* property restitution. Thus, as the compilation notes, the right to restitution of property lost as a consequence of displacement or compensation for its loss is not fully recognised and, therefore, should be addressed in a future international instrument.<sup>107</sup> To this end, the Guiding Principles provide in Principle 29 that:

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

2. *Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation [emphasis added].*

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<sup>105</sup> Ibid., at para.275.

<sup>106</sup> Ibid., at para.274.

<sup>107</sup> Ibid., at paras.269 and 284.

While the compilation concedes that a right to restitution of property or compensation for its loss is not *fully* recognised, it nevertheless identifies a number of developments in international law and practice at the universal and, in particular, regional levels which point towards a right to compensation for human rights violations as well as to an emerging right to restitution and which form the basis for Principle 29.

Of particular relevance to the situation of internally displaced persons, the compilation refers to the report of the Inter-American Commission on Human Rights on the situation of human rights of persons of Miskito origin in Nicaragua in which the Commission recommended payment of compensation to returning internally displaced persons for loss of their property including homes, crops, livestock, and other belongings.<sup>108</sup> In a similar vein, the compilation refers to the World Bank's Operational Directive on Involuntary Resettlement which provides for compensation for losses at full replacement cost for persons displaced involuntarily as a result of development projects that give rise to severe economic, social, and environmental problems.<sup>109</sup>

More generally, the compilation identifies a trend towards a right to compensation for human rights violations. The compilation refers to the right to an effective remedy as provided in Article 8 of the Universal Declaration of Human Rights (UDHR), according to which '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.<sup>110</sup> It also refers to Article 10 of the American Convention on Human Rights (ACHR) which establishes a 'right to compensation', albeit in cases wherein a person 'is sentenced by a final judgement through a miscarriage of justice'.<sup>111</sup>

The compilation also draws on the practice of regional human rights tribunals which 'have consistently ordered compensation for victims of human rights violations in the European and Inter-American systems'.<sup>112</sup> With regard to the Americas, the compilation refers to the decision of the Inter-American Court of Human Rights in

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<sup>108</sup> Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, OEA/Ser.L/V/II.62, document 10, rev. 3 (29 November 1983).

<sup>109</sup> E/CN.4/1996/52/Add.2, at para.275, note 369.

<sup>110</sup> Ibid., note 368.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.



the case of *Aloeboetoe et al.*, in which it ordered compensation to a number of victims of human rights abuses, including surviving relatives.<sup>113</sup> As for Europe, the compilation refers to Theo van Boven's final report to the Sub-Commission on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Van Boven observes that under then Article 50 (now Article 41<sup>114</sup>) of the European Convention on Human Rights (ECHR), the European Court of Human Rights, when it finds that a violation of the Convention by a contracting State has taken place, may afford 'just satisfaction' to the victim provided that the consequences of the violation cannot be fully repaired according to the domestic law of the State concerned.<sup>115</sup> Writing in 1993, van Boven notes that the Court had awarded 'just satisfaction' of a pecuniary nature in far over 100 cases.<sup>116</sup> Van Boven also notes that in a number of cases Governments have also made payments, by way of compensation, as part of a 'friendly settlement' reached in accordance with then Article 28(b) (now Article 38) of the Convention.<sup>117</sup>

A further development supporting the existence of a right to compensation for human rights violations is provided by the compilation in the form of United Nations Security Council resolution 687(1991) in which the Council decided to create a fund to pay compensation for claims by foreign governments, nationals or corporations who suffered any direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait.<sup>118</sup> Moreover, the subsequent decisions of the United Nations Compensation Commission, which was established to administer the fund, have recognised victims of human rights violations as being eligible for compensation.<sup>119</sup>

Looking more squarely at restitution, the compilation and analysis cites the rules of procedure of the International Criminal Tribunal for former Yugoslavia which allow the Tribunal, in conjunction with a judgement of conviction, to award the restitution

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<sup>113</sup> Inter-American Court of Human Rights, *Aloeboetoe et al.* Reparations (art. 63(1) of the American Convention on Human Rights), judgement of 10 September 1993. Series C, No. 15.

<sup>114</sup> As amended by Protocol No. 11 (11 May 1994).

<sup>115</sup> *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8 (1993), at para.80.

<sup>116</sup> *Ibid.*, at para.81.

<sup>117</sup> *Ibid.*, at para.86.

<sup>118</sup> E/CN.4/1996/52/Add.2, at para.275, note 368.

<sup>119</sup> *Ibid.* See United Nations Compensation Commission, Governing Council Decision 1, S/22885, reprinted in 30 *ILM* (1991) 1713, paras.10-14 and Decision 3, S/24589, reprinted in 31 *ILM* (1992) 1028.

of property or its proceeds to victims, even property in the hands of third Parties not otherwise connected with the crime of which the convicted person has been found guilty.<sup>120</sup>

While this does not appear to be the strongest of bases to support the existence of a right to restitution of property, developments subsequent to the publication of the compilation indicate a continuing trend towards the establishment of such a right. One such development was the conclusion in December 1995 of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA).<sup>121</sup> Annex 7 of the GFA guarantees refugees and displaced persons the right to freely return to their homes of origin; the right to have property restored to them of which they were deprived during hostilities; and the right to compensation for any property which cannot be so restored. To give effect to such guarantees, Annex 7 also established a commission for displaced persons and refugees with a mandate to 'receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not now enjoy possession of that property.' The GFA also established, under Annex 6, the Human Rights Chamber for Bosnia and Herzegovina, the highest human rights court in the country. The Human Rights Chamber has delivered several judgements in which legislation and/or administration of property issues, in particular laws on abandoned apartments and properties which aimed at preventing refugees and internally displaced persons from returning to their homes, were found to violate provisions of the European Convention on Human Rights or other applicable international treaties. In such cases, the respondent Parties (the Federation of Bosnia and Herzegovina or the Republika Srpska) were ordered to take the appropriate legislative or administrative measures to remedy the situation and/or to pay compensation to the victims.<sup>122</sup>

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<sup>120</sup> E/CN.4/1996/52/Add.2, at para.275, note 368. According to Rule 105 of the Rules of Procedure and Evidence, adopted 11 February 1994 by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, IT/32 (14 March 1994), '[a]fter a judgement of conviction containing a specific finding ... the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisions measures for the preservation and protection of the property or proceeds as it considers appropriate.'

<sup>121</sup> *General Framework Agreement for Peace in Bosnia and Herzegovina*. Signed in Paris on 14 December 1995. Reprinted in 35 *ILM* (1996) 75.

<sup>122</sup> See, for example, *Medan et al. v. the State and the Federation of BH*, Decision of 7 November 1997, CH/96/3; *Kalinčević v. the State and the Federation of BH*, Decision of 11 March 1998, CH/96/23; *Kevesević v. Federation of BH*, Decision of 10 September 1998, CH/97/46; *Eraković v. Federation of BH*, Decision of 15 January 1999, CH/97/42; *Gogić v.*

A similar line to that taken in the Bosnian context is evident in the practice of CERD. In its General Recommendation No. 22 on Article 5 and refugees and displaced persons, adopted in August 1996, the Committee states *inter alia* that all refugees and displaced persons, displaced by foreign military, non-military and/or ethnic conflicts, 'have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void'.<sup>123</sup>

The then Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in its resolution 1998/26, specifically concerning 'housing and property restitution in the context of the return of refugees and internally displaced persons', while not going quite as far as CERD, nevertheless underlines that the existence of laws and mechanisms to address property restitution are part and parcel of the broader right of internally displaced persons and refugees to return to their homes. Reaffirming this right to return, the Sub-Commission urges all States to 'develop effective and expeditious legal, administrative and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms designed to resolve outstanding housing and property problems'.

More recently, the revised Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, as submitted to the Commission on Human Rights in 2000, provide as forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. With regard to restitution, according to the Basic Principles, 'this should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred.' To this end, restitution *inter alia* includes, 'return to one's place of residence' and 'return of property'.<sup>124</sup>

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Republika Srpska, Decision of 11 June 1999, CH/98/800, Pletilic et al., ('20 Gradiska Cases') v. Republika Srpska, Decision of 8 July 1999, CH/98/659). Cited in W. Kälin, *Guiding Principles on Internal Displacement: Annotations*. Studies in Transnational Legal Policy, No. 32 (2000) 73-74.

<sup>123</sup> See A/51/18.

<sup>124</sup> See *Final report of the Special Rapporteur, Mr. Cherif M. Bassiouni, submitted in accordance with Commission resolution 1999/33. Annex: Basic Principles and Guidelines*

### 3.2.3 Detention

Another area which is to a certain extent of specific relevance and importance to the protection of the internally displaced concerns detention, in particular in closed camps. As the compilation observes, while civilians in general may be at risk of arbitrary detention, especially in situations of armed conflict, it can be a particular problem for the internally displaced:

Internally displaced persons face arrest and detention, often without judicial warrant or other legal safeguards, and sometimes as a means of collective punishment. Relocation frequently involves internment in a compound or camp with no freedom to leave... [I]n some cases, internally displaced persons are considered as part of the political opposition or counter-insurgency simply because they are on the run, have left their homes, or have been detained by warring forces in a situation of armed conflict.<sup>125</sup>

The right of everyone to be free from arbitrary arrest or detention is recognized in several international and regional human rights instruments, namely, in Article 9 of the UDHR, Article 9(1) of the ICCPR, Article 37(b) of the Convention on the Rights of the Child and Article 7(1) of the ACHR, Article 5(1) of the ECHR and Article 6 of the African Charter of Human and Peoples' Rights (ACHPR). Article 9(1) of the ICCPR for example provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

However, as regards the question of whether the detention of internally displaced persons in closed camps is permissible, the compilation observes that there are no precedents on this. That said, it notes that the act of holding someone in a closed camp constitutes detention under Article 9(1) of the ICCPR. The Human Rights Committee has stressed that 'paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness,

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*on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. E/CN.4/2000/62 (2000), at para.22.*

vagrancy, drug addiction, educational purposes, immigration control etc.<sup>126</sup> In accordance with Article 9(1), detention in closed camps is only permissible if it is imposed 'on such grounds and in accordance with such procedures as established' by domestic legislation. Without a legal basis therefore, internally displaced persons cannot be detained in a closed camp and any such detention must not be arbitrary, i.e., 'it has to be reasonable and necessary in all circumstances.'<sup>127</sup>

The foregoing provisions of international and regional human rights law may however, be derogated from in situations of armed conflict, and international humanitarian law as applicable to non-international armed conflict contains no standards concerning when persons may be deprived of their liberty and the associated legal safeguards, such as the right to an effective remedy. In fact, the compilation observes that Article 5 of Protocol II provides a regime for the treatment of persons who are 'deprived of their liberty for reasons related to the armed conflict', implicitly allowing therefore, for the internment or detention of internally displaced persons. As regards international armed conflict, the Fourth Geneva Convention provides in Article 42, that aliens who are protected civilians may be interned or placed in assigned housing only if the security of the Detaining Power absolutely requires such a step, and in accordance with Article 43, such decisions must be periodically reviewed by a court or administrative board. Also Articles 79-135 contain a complete regime for the treatment of internees, whilst Article 75 of Protocol I requires that persons arrested, detained or interned for actions related to the hostilities be promptly informed of the reasons for the measures and requires that they be released as soon as the circumstances justifying the detention have ceased to exist, unless the detention is for reasons of penal offence.

In view of the foregoing analysis, the compilation concludes that the preconditions of lawful detention of internally displaced persons in closed camps 'remain unclear' and that there is a 'clear gap in international law concerning detention in situations

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<sup>125</sup> E/CN.4/1996/52/Add.2, at para.144. See further, Human Rights Watch, *Burundi: Emptying the Hills – Regroupement in Burundi* (June 2000).

<sup>126</sup> Human Rights Committee, *General Comment No. 8*.

<sup>127</sup> E/CN.4/1996/52/Add.2, at para.151, citing *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights - Thirty-ninth session concerning Communication No. 305/1988*. CCPR/C/39/D/305/1988 (1990), at para. 5.8 and Nowak, note 109 above, at 172-3. The compilation also observes that regional human rights law might be more restrictive. Art. 5(1)(a)-(f) ECHR contains an exhaustive list of grounds for lawful detention. 'None of these provisions however, allow the detention of someone because he or she is displaced.' E/CN.4/1996/52/Add.2, at para.152.

of non-international armed conflict' which should be addressed in a future international instrument.<sup>128</sup> Thus Principle 12 seeks to provide some guidance by stating that

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.
3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.

Also Principle 14 provides that internally displaced persons have the right to liberty of movement and freedom to choose their own residence and, '[i]n particular ... the right to move freely in and out of camps and other settlements'.

#### **4. Developing the Guiding Principles – Motives and Opportunities**

The Representative's approach to developing the Principles represents a clear departure from the more traditional intergovernmental approach to human rights law-making, in particular treaty-making. It is an approach which reflects two main considerations. First, that the problem of protection and assistance for the internally displaced required an immediate response from the international community. As the Representative remarked in his 1993 comprehensive study, whilst it would be favourable to develop a legal instrument specifically addressing the problem of internal displacement, the preparation of such an instrument 'takes time and can only be conceived in a long-term perspective. Meanwhile, the compelling conditions and urgent needs of the internally displaced call for a speedy remedy'.<sup>129</sup> Second, the Representative's approach reflects an appreciation of the fact that the most suitable strategy for attaining a 'speedy remedy' was to restate existing law, thereby avoiding 'some of the pitfalls in the process of law-making', that is to say treaty-making.<sup>130</sup> However, avoiding the pitfalls of the treaty-making process was not the only advantage inherent in this approach. On the contrary, developing the

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<sup>128</sup> *Ibid.*, at para.156.

<sup>129</sup> E/CN.4/1993/35, at para.282.

normative framework outside the narrow confines of the intergovernmental treaty-making process has allowed the Representative to mobilise a broader range of actors who have contributed to the process in terms of providing expertise and, importantly, financial and political support.

#### **4.1 Avoiding the Pitfalls of Treaty-Making**

As well as avoiding many of the structural and procedural weaknesses of the treaty-making process discussed in Chapter 2, the Representative's approach to developing a normative framework has allowed him also to avoid potential and time consuming problems arising from the need for consensus among States on the object and purpose and text of the proposed instrument - a pertinent consideration when it comes to standard-setting on an issue such as internal displacement.

In the first place, and bearing in mind the relative urgency of developing a clearer and more explicit normative framework in regard to the internally displaced, it is not certain that States would be able to reach broad agreement on whether, and what sort of an instrument may be appropriate in this instance. From the outset, the Representative has acknowledged the tension between those who believe that the existing law provides adequate coverage for the rights of the internally displaced and those who advocate a new legal regime.<sup>131</sup> At the Commission's 1996 session, the representative of Switzerland observed that the existing rules contained in human rights and humanitarian law already provided sufficient protection and felt that the elaboration of a new mandatory legal instrument might weaken the existing system of protection 'by making it more complicated and by giving the impression that it was the rules which were deficient when very often it was only the will to apply them'. The appropriate means of filling the gaps in protection was not through the adoption of a new legal instrument but rather the 'strict and sincere application of existing rules'.<sup>132</sup> The representative of Mexico felt that the internally displaced 'did not constitute a sufficiently distinctive group to merit a separate legal regime' and '[m]uch could still be achieved through better coordination between the various agencies involved in humanitarian assistance and the protection of human rights'.<sup>133</sup> The Cypriot delegate on the other hand, endorsed the idea of restating general

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<sup>130</sup> Interview with Dr. Francis Deng, Representative of the Secretary-General, Geneva, 9 April 1998.

<sup>131</sup> E/CN.4/1993/35, at para.71.

<sup>132</sup> *Summary record of the 40<sup>th</sup> meeting*. E/CN.4/1996/SR.40, at para.9.

<sup>133</sup> *Summary record of the 39<sup>th</sup> meeting*. E/CN.4/1996/SR.39, at paras.22-4.

principles of protection in more specific detail and enhancing the system of protection in a future international instrument;<sup>134</sup> and Austria's representative concurred with the views of the Representative of the Secretary-General concerning the insufficient coverage of existing standards and endorsed the development of a 'legal framework'.<sup>135</sup>

States aside, even amongst the more 'enlightened' there is divergence of opinion on this issue. In his 1993 report to the Commission, the Representative observed that the United Nations Education, Scientific and Cultural Organisation (UNESCO), the US Committee for Refugees, the Lawyers Committee for Human Rights and the RPG supported the development of new international standards, whilst the ICRC emphasised the need for better compliance with existing standards. Similarly, the International Organisation for Migration (IOM) felt that existing standards were adequate and that failure to comply with human rights and humanitarian law is the main problem.<sup>136</sup>

On a more practical and general level it is pertinent to recall our observations in Chapter 2 that some States consider the international community's overall level of treaty-making excessive; and that many States cannot afford to send specialised delegations to observe or participate in all of the drafting exercises being undertaken at any one time. Such considerations may be expected to figure in the attitude of States as to whether to proceed with the drafting of an international instrument for the internally displaced, especially those States that are not affected by the problem.

Assuming there is sufficient political interest to proceed with a standard-setting exercise, the need to reach consensus on the draft text may easily hinder negotiations and result in a text which represents the lowest-common denominator of interests. To begin with, although internal displacement is a problem which affects between 20-25 million people worldwide, those affected are found in only around 40 countries which is less than one quarter of the United Nations membership.<sup>137</sup> Moreover, the largest groups of internally displaced persons are to

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<sup>134</sup> Ibid., at para.15.

<sup>135</sup> Ibid., at para.29.

<sup>136</sup> E/CN.4/1993/35, at paras.78-81.

<sup>137</sup> As of 31 December 1999, the US Committee for Refugees listed over 21 million internally displaced persons in the following 40 countries: Sudan, Angola, Colombia, Myanmar, Turkey, Iraq, Bosnia and Herzegovina, Burundi, Democratic Republic of Congo, Russian Federation, Afghanistan, Rwanda, Federal Republic of Yugoslavia, Azerbaijan, Sri Lanka, India, Republic of Congo, Sierra Leone, Syria, Uganda, Indonesia, Lebanon, East Timor,



be found in less developed countries, reflecting the significant regional variations in what is ultimately a global problem. In the African continent alone, up to 21 States have significant populations of internally displaced persons and the scale of displacement is growing in some parts of Africa, while the situation of the internally displaced is deteriorating.<sup>138</sup> Moreover, it is a problem which manifests itself in a variety of ways. For example, in Somalia, Sri Lanka and former Yugoslavia, the internally displaced were generally clustered in camps, forced from their homes and deprived of their entire natural resource base and, therefore, totally dependent upon humanitarian assistance and often dubious protection from the authorities.<sup>139</sup> In El Salvador, the internally displaced were villagers integrated into rural areas who lacked land, services and security,<sup>140</sup> whereas in Colombia the internally displaced would flee in 'absolute silence' and merge into the community to which they fled in order to avoid being identified as displaced. A displaced person is considered to be a person with a 'problematic past', a perception exacerbated by the fact that most 'visible' displaced persons are linked to a political organisation.<sup>141</sup> Once assimilated, the problems of the internally displaced are generally the same as those of the community which shares much the same plight of poverty and deprivation.<sup>142</sup>

That there are differences between affected States in terms of the nature and extent of the problem would likely influence the views of individual States with regard to the instrument's object and purpose and the means by which these should be achieved. Furthermore, it might reasonably be asked how Western States are likely to perceive the problem and consequently the object and purpose of a treaty on the issue, in view of their lack of first-hand experience of the issue and propensity towards the containment and prevention of refugee movements. Given such considerations, attempting to reach consensus on a draft treaty would almost certainly be fraught with difficulty and even if a consensus text were forthcoming there is the danger that it would represent the lowest-common denominator

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Somalia, Ethiopia, Georgia, Cyprus, Eritrea, Israel, Philippines, Algeria, Kenya, Peru, Bangladesh, Croatia, Guinea-Bissau, Liberia, Nigeria, Solomon Islands, Mexico. List available at [www.refugees.org/world/statistics/wrs00\\_table5.htm](http://www.refugees.org/world/statistics/wrs00_table5.htm)

<sup>138</sup> See UNHCR/Brookings Institution/OAU, *Internal Displacement in Africa – Report of a Workshop held in Addis Ababa, Ethiopia, 19-20 October 1998* (1998) 5.

<sup>139</sup> Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolutions 1993/95 and 1994/68. E/CN.4/1995/50 (1995), at para.23.

<sup>140</sup> Ibid.

<sup>141</sup> Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1993/95. Addendum. Profiles in Displacement: Colombia. E/CN.4/1995/50/Add.1 (1994), at para.57.

<sup>142</sup> Ibid., at para.110.

formulation, constituting little, if any, advance in the protection of the internally displaced.

Finally, even if negotiations are ultimately successful they may mask disagreement among States which later manifests itself in a low number of signatures and ratifications. Furthermore, if the States currently affected by problems of internal displacement were not to ratify the treaty, then its entire *raison d'être* would be seriously undermined. In this connection, it should be noted that the majority of States affected by internal displacement are amongst the 'non-ratifiers of human rights treaties' and are unlikely to want to restrict their internal affairs any further than at present.<sup>143</sup> In addition, the object and purpose of the treaty could easily be undermined should States take out reservations against the treaty. And nowhere in international treaty law are reservations 'more popular and numerous' than in human rights treaties.<sup>144</sup>

In order to avoid such controversies and problems, not least of all on account of the time that it would likely take to draft a treaty on the protection of the internally displaced, the Representative opted for the elaboration of the Guiding Principles. However, as indicated above, avoiding the pitfalls of the treaty-making process was not the only advantage or opportunity to arise from this approach. Indeed, the Representative's approach of remaining outside the traditional intergovernmental treaty-making process has allowed him to mobilise a broader range of actors to assist the process in terms of expertise and the provision of financial and material and, crucially, political support.

#### **4.2 Broader Range of Expertise**

As noted in Chapter 2, expertise is a fundamental requirement in human rights treaty-making if one is to avoid legal inadequacies in the draft instrument and

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<sup>143</sup> Of the displacement-affected States listed in note 137 above, as of 18 May 2001, Eritrea, Indonesia, Liberia, Myanmar and Turkey have not ratified the ICESCR; Eritrea, Indonesia, Liberia, Myanmar, Somalia and Turkey have not ratified the ICCPR; Angola, Eritrea, Kenya, Myanmar and Turkey have not ratified the Convention on the Elimination of Racial Discrimination; Afghanistan, Solomon Islands, Somalia and Sudan have not ratified the Convention on the Elimination of Discrimination Against Women; Angola, Republic of Congo, Eritrea, India, Iraq, Liberia, Myanmar, Nigeria, Rwanda, Solomon Islands and Sudan have not ratified the Convention Against Torture. See OHCHR, *Status of Ratifications of the Principal International Human Rights Treaties as of 18 May 2001*. Available at [www.unhchr.ch](http://www.unhchr.ch)

normative conflict with other instruments. It is, however, a requirement which is not always present to a sufficient degree in the negotiation and drafting of human rights instruments within the United Nations. However, by avoiding the traditional intergovernmental approach to human rights standard-setting the Representative has been able to overcome such problems and secure and make effective use of a broad range of expertise. Indeed, the drafting of the compilation and analysis and the Guiding Principles were marked by two particularly important features: the high level of participation of non-state experts in the process; and the gradual widening of the drafting process beyond the core legal team involved with drafting the compilation and the principles, to include as broad a range as possible of non-governmental actors involved in the practical provision of protection and assistance to the internally displaced.

In May 1994, prompted by both the very limited resources at his disposal and the importance of ensuring a high quality compilation and analysis of legal norms, the Representative, with the support of RPG, the Brookings Institution and the Government of Austria, requested the assistance of three highly accredited institutions in international law: the Vienna-based Ludwig Boltzmann Institute of Human Rights, and the Washington based American Society of International Law (ASIL) and the International Human Rights Law Group (IHRLG).<sup>145</sup> Two compilations/commentaries were prepared, one by Professor Manfred Nowak and Otto Linher for the Ludwig Boltzmann Institute and the other by Professor Robert Goldman, Cecile Meijer and Janelle Diller for the ASIL/IHRLG. The Boltzmann paper provided a consolidation of the provisions found in international human rights law and humanitarian law by selecting the rights considered to be most relevant to the protection of the internally displaced (the so-called rights approach). The ASIL/IHRLG paper sought to identify the needs of internally displaced persons and to then describe the relevant human rights and humanitarian law that corresponded to these needs in three situations: situations of internal tensions and disturbances and/or disasters; non-international armed conflicts; and international armed conflict (the so-called needs approach). Both papers arrived at similar conclusions as to the need for an elaboration of a body of principles to address areas where there existed legal uncertainty or where clarification of norms was beneficial.

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<sup>144</sup> Simma, 'International Human Rights and General International Law: A Comparative Analysis', 4 (2) AEL (1995) 176.

In conjunction with the preparation of the compilations/commentaries, the RPG and the Brookings Institution together with the ASIL and the IHRLG, convened several meetings of legal experts to assist the team, including, Louis Sohn, Tom Farer, Charlotte Ku, Arthur Helton, Antonio Cançado Trindade, Louis Henkin, Luke Lee, David Martin and Thomas Buergenthal, as well as representatives of the ICRC, UNHCR, the then Department of Humanitarian Affairs (DHA), the International Organisation for Migration (IOM), the US Committee for Refugees, Human Rights Watch, the Committee on Security and Cooperation in Europe, and the Inter-American Commission on Human Rights.

In October 1994, the Austrian Ministry of Foreign Affairs hosted a legal round table to review the two compilations/commentaries, and the first formal effort to open the process up to include other experts and relevant actors. In addition to the Representative and the legal team, participants included representatives from international agencies and organisations such as the Centre for Human Rights, UNHCR, DHA, IOM, ICRC; NGOs, namely, RPG, the Norwegian Refugee Council (NRC), the Quakers; as well as research institutions and academics. The ASIL/IHRLG needs approach was considered helpful in identifying not only the existing legal standards but also the gaps and weaknesses in such protection and it was decided that this would form the basis of the final compilation. The envisaged body of principles on the other hand, would follow a 'rights' approach as contained in the Boltzmann paper. To this end it was recommended that the two texts be merged to form the compilation and analysis of legal norms to be submitted to the Commission.

Although the Vienna roundtable took place in a 'congenial, cooperative spirit', there were nevertheless tensions between the European and American experts. While the papers were conceptually different in their approach to the issue, there was an additional difference in terms of the body of 'hard' international law on which the European and American experts were prepared to draw, stemming from different perceptions as to what constitutes customary international law. Reflecting the rather imprecise nature of customary international law, the European experts relied upon principles of customary law only when necessary and only in instances where the principle in question had been accepted as customary by a large number of States, such as through its codification in an international treaty. The American experts on

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<sup>145</sup> The Government of Austria brought in the Ludwig Boltzmann Institute, while RPG and the Brookings Institution brought in ASIL/IHRLG.

the other hand, tended to assert that a specific principle constituted customary international law by virtue of its inclusion and repetition in certain United Nations resolutions or declarations and other such pronouncements. This approach is common among international lawyers in the United States who regard it as a means of compensating for the 'abstinence of the United States *vis-à-vis* ratification of international human rights treaties'.<sup>146</sup> By claiming the existence of a customary law of human rights to be applied as federal common law, the federal courts 'accomplish through the back door of [customary international law] what the political branches have prohibited through the front door of treaties'.<sup>147</sup>

Such claims are, however, based on a rather flexible approach to custom formation based more on what States say than what they do. The result has been a rather extensive body of customary law principles which are considered binding on all States and therefore, applicable before United States courts. The approach is not without its problems however. Possibly the most trenchant critique of this approach has come from Simma and Alston for whom the elevation of the Universal Declaration and subsequent documents to the status of customary law, in a world in which 'it is still customary for a depressingly large number of States to trample upon the human rights of their nationals',<sup>148</sup> has served to contribute to the 'identity crisis' of customary international law, referring to the tendency of some writers to resort to a 'streamlined theory of customary law, more or less stripped of its traditional practice requirement', in order to be able to 'find a customary law of human rights wherever it is needed'.<sup>149</sup> This effort to up-date custom may exact 'fundamental and

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<sup>146</sup> Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', 12 *Australian YB Int'l. L.* (1992) 87.

<sup>147</sup> Bradley and Goldsmith, 'The Current Illegitimacy of International Human Rights Litigation', 66 *Fordham L. Rev.* (1997) 330-331. See also by the same authors, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 *Harv. L. Rev.* (1997) 816. Richard Lillich explains the point more fully as follows: 'Although Article VI, section 2 of the Constitution makes treaties the supreme law of the land, the United States always can avoid or lessen the domestic impact of human rights treaties by failing to ratify them or by ratifying them subject to non-self executing declarations. However, customary international law, at least where the United States has not persistently objected to a particular norm during the process of its formation, *ipso facto* becomes supreme federal law and hence may regulate activities, relations or interests within the United States... Thus, the potential impact of customary international human rights law upon the American legal system is substantial.' Lillich, 'The Constitution and International Human Rights', 83 *AJIL* (1989) 856-7. See also, Bayefsky and Fitzpatrick, 'International Human Rights Law in United States Courts: A Comparative Perspective', 14 *Mich. J. Int'l. L.* (1992) 4; and Brilmayer, 'Federalism, State Authority, and the Pre-emptive Power of International Law', 1994 *Sup. Ct. Rev.* 324, note 87.

<sup>148</sup> Simma and Alston, note 146 above, at 90.

<sup>149</sup> *Ibid.*, at 107.

irreparable violence to the very concept',<sup>150</sup> or at a minimum may undermine it as a source of international human rights law. As the scope and reach of the human rights norms increases, and as their ramifications become greater, 'the need to ensure that the relevant norms are solidly grounded in international law assumes increasing importance.'<sup>151</sup>

The middle ground between the European and American approaches was found by Walter Kälin of the University of Bern who participated in the Vienna roundtable and was brought into the legal team at a meeting in Geneva in May 1995. The meeting was convened to discuss possible ways in which to merge the two compilations/commentaries. On the basis of the discussions, Kälin merged the two documents during the summer of 1995. Given that the ASIL/IHRLG approach ensured that all the needs of the internally displaced were covered by the legal analysis, Kälin took this paper as the basis for the compilation and filled in the hard law as contained in the Boltzmann paper as and where necessary, placing the emphasis on hard law provisions as contained in treaties and legally binding judgements of regional human rights courts, and reinforcing this with soft law provisions contained in documents such as declarations, resolutions, and guidelines. The merged document was reviewed and approved at a small expert meeting in Washington DC in September 1995 and was submitted to the Commission in 1996 as the compilation and analysis of legal norms.

The Commission subsequently 'called upon' the Representative to proceed with the development of an appropriate framework,<sup>152</sup> and in June 1996 a meeting was convened in Geneva to begin drafting the principles. The meeting was attended by a small, but expanded team of legal experts, including Nowak, Goldman, Meijer, Kälin, as well as Jean-Francois Durieux of UNHCR, Jean-Philippe Lavoyer and Toni Pfanner of ICRC, and Daniel Helle and Maria Stavropoulou from the UN Centre for Human Rights, all of whom had become part of the team following the Vienna roundtable. The participation of staff members from UNHCR and ICRC was particularly important because of the operational role both organisations play with the internally displaced. Secondly, the participation of ICRC was politically crucial given their initial concerns that the process of developing the normative framework should not undermine international humanitarian law. However, by 1996, ICRC

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<sup>150</sup> Ibid., at 83.

<sup>151</sup> Ibid., at 82.

<sup>152</sup> CHR res.1996/52.

expressed the view that they would not have a problem with a set of principles, code of conduct or declaration, which clarified gaps and reaffirmed existing rules and did not replace existing legal instruments or effective implementation of the law.<sup>153</sup>

The June meeting also reviewed the second part of the compilation and analysis of legal norms which was being drafted by Stavropoulou and which focused on the legal norms relevant to protection from displacement. Deng considered this an important aspect of the process in order to establish a *comprehensive* legal framework for the internally displaced. Moreover, there had been calls from UNHCR among others that the principles cover not only actual displacement, but the pre-displacement phase as well in order to increase legal protection against displacement.

A second meeting of the legal team was convened in Geneva in October 1996 to further discuss the draft principles. With a view to gaining greater international acceptance for the principles a meeting was also held to obtain the views of a wide group of UN agencies and NGOs, including representatives of DHA, UNHCR, IOM, WHO, UNDP, WFP; and representatives from ICRC, the Quakers, the International Commission of Jurists, and RPG. The draft principles were refined further at a meeting of the legal team in Geneva in April 1997 which also reviewed the second part of the compilation and analysis.

In addition to the various formal expert drafting meetings, the drafting process was also characterised by less formal aspects. For example, outside the framework of the meetings of the legal team, comments were actively solicited from NGOs and international agencies. Not only did this maintain broad involvement in, and support for the process, it also assisted in improving the quality and relevance of the draft principles. The Women's Commission on Refugee Women and Children, for example, helped to sharpen the provisions on women and children and the ICRC and Human Rights Watch helped to refine articles on protection.

The draft principles were finalised in January 1998 at an expert consultation in Vienna hosted by the Austrian Ministry of Foreign Affairs. Recognising that responsibility for taking the Guiding Principles forward from this point on lay with United Nations agencies, NGOs, and regional organisations who would be key in

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<sup>153</sup> *Summary record of the 33<sup>rd</sup> meeting.* E/CN.4/1996/SR.33 (1996), at para.58.

the implementation and application of the principles, the meeting opened up the process as broadly as possible. In addition to the legal team it brought together some 40 participants, including human rights and legal experts from Africa, America, Europe, Asia and the Middle East; representatives of United Nations agencies such as UNDP, the Office of the Emergency Relief Coordinator, UNHCR, UNICEF, IOM, ICRC, the United Nations Centre for International Crime Prevention, WFP; representatives of regional organisations, namely the Organisation of African Unity (OAU), the Organisation of American States (OAS), and the Organisation for Security and Cooperation in Europe (OSCE); and representatives of NGOs such as the Quakers, Women's Commission for Refugee Women and Children, the Norwegian Refugee Council's Global IDP Survey, the Open Society Institute, RPG, Human Rights Watch, and the International Commission of Jurists.

Rather than being a potentially stale drafting session in which participants systematically discussed the draft principles in turn, the expert consultation was seen instead as an opportunity for comment on the draft principles and also discussion of important issues covered by the principles. To this end, the consultation was arranged around certain 'themes' such as the quest for a definition, protection from arbitrary displacement, protection of displaced populations, access to humanitarian assistance, women and children, return and reintegration or resettlement, and application of the principles, at the international, regional and national levels. The inclusion of such a broad range of actors was not without its problems however. For example, tensions arose between the legal team and some of the agencies who would have preferred to see more practical or specific measures which they considered necessary to give effect to a particular right but which were considered by the legal team to detract from the legal nature of the principles. Overall though, the participants strongly endorsed the Principles and emphasised their wide dissemination among Governments, United Nations agencies, international and regional organisations, and NGOs. The meeting concluded with a commitment on the part of the participants to undertake efforts to disseminate, promote and apply the Principles.

#### **4.3 Financial Support**

In addition to being able to make more effective use of a broader range of expertise, developing the normative framework outside the confines of the United Nations treaty-making process also allowed the Representative to mobilise a broader range



of actors who have supported the process in financial terms. Indeed, given that the vast majority of the process took place outside the framework of the United Nations, a vital component of the development of the normative framework was the availability of adequate funds to meet the substantial costs incurred in the drafting process such as travel expenses to the various meetings, hotel accommodation and meals, meeting facilities, not to mention costs associated with document production, photocopying, secretarial support, telecommunication costs, postage/courier charges and such like. Moreover, as the process widened to include a broader range of actors, so costs increased accordingly. Meeting the various costs was well-beyond the very limited funds at the disposal of Deng in his capacity as the Representative of the Secretary-General - despite the financial and human support provided to the mandate by the Norwegian Government and, on a shorter-term basis, by Harvard University.<sup>154</sup> It was, therefore, apparent early on that it would be necessary to go outside the United Nations system to elicit the necessary support.

Initial costs in relation to the two compilations/commentaries were met by a variety of sources. The Austrian Ministry of Foreign Affairs funded the Boltzmann contribution while the ASIL/IHRLG received support from the Jacob Blaustein Institute for the Advancement of Human Rights, the Hauser Foundation, the European Human Rights Foundation, the Centre for Human Rights and, in its latter stages, the Brookings Institution Project on Internal Displacement. The legal team, however, was not paid for their work. Some of the researchers received 'honoraria' and their organisations some funds, but Goldman, Nowak, Kälin, Stavropoulou etc., did not receive personal compensation, but rather worked on the basis of 'voluntary servitude' as Goldman once described it.

The Brookings Institution Project was a key actor in mobilising resources. The Project was established following consultations between Deng and then United Nations Secretary-General Boutros-Ghali, during which the latter requested Deng, in addition to the normal requirements of his mandate, to conduct, in partnership with independent research institutions, an in-depth study on internal displacement and develop a comprehensive global strategy for providing effective protection, assistance, reintegration and development support to the internally displaced. In

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<sup>154</sup> In 1993 the Norwegian Government contributed funds to the Centre for Human Rights to support the work of the mandate and to pay for an associate expert to assist the Representative. In addition, Harvard University funded an intern for six weeks during the summer of 1993 to assist the Representative and who was subsequently kept on at the Centre for Human Rights on short-term assignments.

response to this request, the Brookings Institution established the Project in association with the RPG. Roberta Cohen, senior adviser to RPG, joined the Project as associate and later co-director. The Project developed along the lines of the Representative's mandate and, as a reflection of the severely limited human and material resources available to the Representative from the United Nations, has played an instrumental role in raising and providing funds for the development of the normative framework.

Funding for the Project itself has come from a variety of sources such as the Office of the Secretary-General, the Governments of Norway, the Netherlands, and Sweden, as well as the McKnight Foundation. Funds earmarked specifically for the development of the normative framework came from the Ford Foundation which contributed towards expenses arising in connection with the meetings of the legal team in May and September 1995, June and October 1996, and April 1997. The Project was not always the sole funder of these meetings however. The United Nations Centre for Human Rights funded the meeting costs, lodging and meals, as well as the travel expenses of the Representative at the May 1995 meeting, while the Project funded the international travel of seven of the participants. The Austrian Ministry of Foreign Affairs, as well as covering many of the costs arising from the October 1994 roundtable, also absorbed the accommodation and conference costs arising from the expert consultation in Vienna in 1998.

In order to meet the travel expenses for the Vienna consultation (which was originally planned for the autumn of 1997) it became apparent during the course of 1996 and onwards that it would be necessary to raise extra funds in addition to those provided by the Ford Foundation. The process of developing and refining the Guiding Principles was proving to be a far more complex undertaking than originally envisaged. Consequently, the drafting process was taking more time and meetings than was foreseen in the original proposal to the Ford Foundation. Rather than the three meetings of the drafting group in June and October 1996 and April 1997, the original proposal had envisaged only one. Also, the original proposal had not envisaged the second meeting in October 1996 with United Nations agencies and NGOs which was considered crucial in order to elicit their views prior to the presentation of the draft principles to the expert consultation in Vienna. In addition, the decision that the draft principles should cover the pre-displacement phase as well as actual displacement also served to slow the process down.

During 1996 and 1997 Deng and Cohen approached various intergovernmental and non-governmental sources in an effort to raise additional funds. Funds, however, were not readily forthcoming. The second part of the compilation was undertaken on a completely voluntary basis by Stavropoulou and Kälin with the Project absorbing the additional costs of the development of the principles. Additional funds were, however, necessary to cover the travel expenses of participants to the expert consultation in Vienna. During August 1997 the Representative sought funds from a variety of sources such as the Centre for Human Rights and UNHCR. UNHCR for example, covered the travel of participants from Africa, Asia and Latin America.

#### **4.4 Political Support**

Finally, and rather crucially, it should be acknowledged that the credibility and potential utility of the Representative's efforts in developing the Guiding Principles has depended on the political support, or at the least the acquiescence, of states in both the Commission on Human Rights and the General Assembly. This was particularly important given the approach of going outside the United Nations framework and the limited involvement of States in the drafting process. Eliciting the necessary support was achieved through a combination of means and by a broad range of actors, composed of states, international agencies and NGOs.

To begin with, the resolutions of the Commission and the General Assembly were drafted so as to reflect and support the conclusions and recommendations contained in the reports of the Representative, i.e., the measures which Deng saw as the most appropriate course for the continued development of the normative framework. Crucial in this regard was the role of the sponsors of the draft resolutions - Austria in the Commission and Norway in the General Assembly - as well as NGOs to lobby and galvanise support from among States for the relevant parts of the report in the draft resolution.

Secondly, the language in the resolutions recalled and underlined that the development of the normative framework was being pursued in response to requests by the Commission or the General Assembly, i.e., States. Thus, for example, in its 1993 resolution the Commission noted that the Representative had identified a number of tasks requiring further attention and study, including the compilation of existing rules and norms and the question of guiding principles and subsequently requested the Secretary-General to mandate the Representative for

period of two years to continue his work to identify ways and means of improved protection and assistance for internally displaced persons.<sup>155</sup>

Thirdly, that the process was essentially being directed by States was further reinforced through the adoption of General Assembly resolutions which both reflected the concerns of the Representative and called for a specific course of action from the Commission. Thus in December 1995 the General Assembly called upon the Commission to consider the question of establishing an appropriate legal framework on the basis of the compilation and analysis of legal norms.<sup>156</sup> Subsequently, the Commission's 1996 resolution referred to the General Assembly's request and accordingly called upon the Representative to continue, on the basis of his compilation, to develop an appropriate framework for the protection of the internally displaced.<sup>157</sup> Similarly, in 1997, the Commission referred again to the request of the General Assembly and subsequently encouraged the Representative to continue, on the basis of the compilation, to develop a comprehensive framework for the protection of internally displaced persons, taking note of his preparations for guiding principles.<sup>158</sup>

Finally, the reports and statements of the Representative to the Commission and General Assembly sought to affirm that his work was directed by the Commission and the General Assembly. For example, the Representative's report to the Commission in 1995 notes that '[b]oth the Commission on Human Rights and the General Assembly have encouraged the preparation of a compilation and commentary on existing norms.'<sup>159</sup> Similarly, the Representative's statement to the Commission in 1995 noted that significant progress has been made in the area of legal standards and that a broad consensus had emerged around the Commission's request for a compilation and analysis of legal norms.

These various strategies were not, however, infallible. This was apparent at the Commission's 1998 session to which the Guiding Principles were submitted. Some sort of recognition of the Principles from the Commission was crucial to enhance their standing and potential use, though the Representative was under no illusions that this would be straightforward. During consultations with Austria immediately

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<sup>155</sup> CHR res.1993/95.

<sup>156</sup> GA res.50/195 (1995).

<sup>157</sup> CHR res.1996/52.

<sup>158</sup> CHR res.1997/39.

<sup>159</sup> E/CN.4/1995/50, at para.106.

after the expert consultation in January, it was noted that the general political climate and the fact that the Representative's mandate was up for renewal would make discussions at the Commission's 1998 session more difficult. Consequently, it was felt that strong endorsement of the Principles would be unrealistic, and that perhaps the most that could be expected was that the Commission 'takes note with appreciation' of the Principles, and that they would pass the Commission without any major obstacles. To this end, it was considered necessary for the Representative to be present at the Commission for a longer period in order to mobilise support, especially among regional groupings. It was also considered tactically important to encourage support for the Guiding Principles among United Nations agencies.

These concerns were not without foundation. At the Commission, Mexico expressed reservations as to the manner in which the Guiding Principles were to be received by the Commission, the gist of its concerns being that what was happening here was some form of standard-setting by the back-door. In particular, Mexico had a problem with the language of the Commission's draft resolution on internally displaced persons, according to which the Commission 'takes note' of the report of the Representative, including the study on the legal aspects relating to protection against arbitrary displacement and the Guiding Principles. Mexico stated its regret that the Representative's report, including 'what the Representative understood as the guiding principles' was distributed so late on in the proceedings of the Commission - they were not available until the day on which the internal displacement issue was itself on the agenda, due to the heavy administrative burden placed on the secretariat. As such Mexico was unable to 'pronounce any judgement' on the guiding principles. Mexico alluded further to its concerns regarding standard-setting-by-the-back-door by referring to General Assembly resolution 41/120 which, as noted in Chapter 2, lists certain guidelines which Member States and United Nations bodies should bear in mind in developing international instruments in the field of human rights. Of these, Mexico referred specifically to the need for consistency with existing international human rights law and broad international i.e., state support.

Mexico, however, declined from objecting to the consensus adoption of the draft resolution. In part this was due to amendments which Austria introduced to the draft resolution to accommodate the concerns of Mexico. In particular, the draft resolution was revised to read that the Commission simply 'takes note' of the report

of the Representative, including the study on the legal aspects relating to protection against arbitrary displacement and the guiding principles. Although Mexico still had a problem with this wording, pursuant to the January consultations, the draft resolution stated originally that the Commission 'takes note with appreciation'.

Mexico's reluctance to push its concerns also lay in the fact that the draft resolution had an impressive number of co-sponsors which, moreover, reflected a wide geographical distribution, including other Latin American States, and a number of States to which the Representative had undertaken missions.<sup>160</sup> This was another crucial aspect of the political process - forming a coalition of state support, preferably reflecting a wide geographical distribution. The greater the number of co-sponsors and the broader the geographical representation, the politically less feasible it becomes for recalcitrant States to obstruct the process. One way of facilitating this was to maintain language in draft resolutions which had been agreed to by States in previous resolutions on the issue. This allowed the sponsors to approach co-sponsors of previous resolutions on the issue and to seek their support for the draft resolution on the grounds that it contained language which they had accepted in the past. Another was lobbying - at various points during the development of the normative framework NGOs and experts at the different meetings took on the task of bringing governments on board. For example, Adama Dieng of the International Commission of Jurists lobbied African Governments; in Latin America, Goldman and Cohen participated in a regional conference on refugees and displaced persons, convened in Costa Rica in 1994 and attended by Latin American Governments, at which they pushed for support for development of the normative framework.<sup>161</sup>

Other political initiatives, undertaken prior to the Commission's session also account for the limited opposition to the Principles. Preceding their presentation to the Commission, the Principles were presented by Deng and Kälin to the United Nations

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<sup>160</sup> The following 55 countries sponsored the resolution which was adopted without a vote: Afghanistan, Angola, Argentina, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Chile, Colombia, Congo, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mozambique, Netherlands, Nicaragua, Norway, Peru, Poland, Portugal, Republic of Korea, Russian Federation, Rwanda, Slovakia, Slovenia, South Africa, Sweden, Switzerland, Uganda, United States of America, Uruguay and Zambia.

<sup>161</sup> See Cohen, 'Internally Displaced Persons: Global and Regional Initiatives, Specific Protection Needs and the Importance of an Inter-Agency Framework', in IIDH-ACNUR, *10 Años de la Declaración de Cartagena sobre Refugiados* (1995) 311.

Inter-Agency Standing Committee (IASC), on the recommendation of Sergio Vieira de Mello, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, with a view to gaining the support of the heads of the various United Nations humanitarian, human rights and development agencies and the IASC itself, before their submission to States in the Commission. In March 1998 – and in no small measure facilitated by the inclusion of international agencies in the drafting process – the IASC adopted a decision welcoming the Guiding Principles and encouraging its members to share them with their executive boards and their staff, especially those in the field, and to apply them in their activities on behalf of internally displaced persons. The support of the agencies combined with that of sympathetic States in the Commission effectively made the Commission's acceptance of the Guiding Principles a *fait accompli*. The agencies for their part were very keen to have the Guiding Principles to assist them with their work. During the Commission's debate on the issue the agencies gave lengthy statements in support of the Guiding Principles and of their value to the agencies' operations.<sup>162</sup>

The reservations of Mexico were, however, not the only potential stumbling block which needed to overcome. Another obstacle arose earlier on in the development of the normative framework and from a source far closer to the heart of the mandate – the Nordic countries – who were initially reluctant to proceed with the Guiding Principles until the Commission had first adopted the draft declaration on minimum humanitarian standards emanating from the Sub-Commission. The draft declaration was transmitted to the Commission in 1994 'with a view to its further elaboration and eventual adoption'.<sup>163</sup> Given that this initiative continues to languish in the

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<sup>162</sup> For example, Sadako Ogata referred to the Guiding Principles as being of considerable importance to the work of UNHCR. The World Food Programme (WFP) described the Guiding Principles as well-formulated, clear, concise and a useful tool for the humanitarian community. WFP also drew attention to the decision of the IASC which it intended to implement in due course. Similarly, the United Nations Children's Fund (UNICEF) welcomed the Guiding Principles as an excellent reference point and programmatic tool to assist field based agencies and stated its commitment to gaining the widest endorsement possible and their dissemination within UNICEF and amongst its partners throughout the world. The International Organisation for Migration (IOM) welcomed and supported the Guiding Principles and stated that through their dissemination to field offices, it would encourage its field staff to become aware of the Principles and to ensure that programmes conform to the basic norms established. Finally, ICRC considered the Guiding Principles as constituting a useful tool to promote knowledge about relevant standards and stated its intention to promote their awareness both in the field and at headquarters. Governments also spoke in favour of the Principles. In addition to Austria, Switzerland, and Sweden, on behalf of the Nordic countries, the United States (represented by Cohen) went on record for the first time and agreed to sponsor the draft resolution. Statements on file with the author.

<sup>163</sup> Sub-Comm'n res.1994/26.

Commission several years later,<sup>164</sup> for the Nordics to have insisted on such a course could have had disastrous consequences for the development of the normative framework for the internally displaced. Even without the benefit of hindsight though, Deng was acutely aware of the need to separate the development of the normative framework from the draft declaration, not least of all because the latter was not considered to address sufficiently the protection concerns of the internally displaced.

The situation came to a head in 1996 following submission of the compilation and analysis to the Commission. In the Commission's debate on the issue Austria, Cyprus, and Hungary strongly favoured the development of a legal framework. Sweden, however, speaking on behalf of the Nordic countries, recommended that the gaps in existing law identified in the compilation and analysis be addressed by the draft declaration of minimum humanitarian standards, and that a restatement of general principles of protection for internally displaced persons could be accomplished through the development of guidelines such as the UNHCR Guidelines for the Protection of Refugee Women.<sup>165</sup> Although the Commission's resolution enabled the Representative to proceed with the development of the normative framework by calling upon him 'to continue on the basis of his compilation and analysis of legal norms, to develop an appropriate framework', the original draft prepared by Austria was stronger. It called for the consolidation 'in one document' of the rights for the protection of the internally displaced and in this connection called upon the Representative to develop a 'legal framework' for their protection.

In order to de-link the development of the normative framework from the minimum humanitarian standards initiative, Deng cooperated with those involved in the draft declaration so that the two documents were seen and pursued as complimentary to each other which they were. Deng felt that agreement between the two groups would persuade the Nordic countries to drop their objections to a separate set of principles. In addition to consulting with the Nordics, Deng also addressed a Nordic-sponsored workshop on the draft declaration, held in Cape Town in September 1996. Emphasising that the internally displaced need and deserve special attention, as demonstrated by the fact that the international community had established a

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<sup>164</sup> At its fifty-seventh session in 2001, the Commission adopted a chairman's decision indicating the issue of what is now referred to as 'fundamental standards of humanity' would remain on the Commission's agenda and that it would again consider the issue at its fifty-eighth session to which a report would be submitted by the Secretary-General covering 'relevant developments'. CHR dec.2001/112.

<sup>165</sup> E/CN.4/1996/SR.39, at para.49.



mechanism for addressing their plight, the Representative proceeded to observe that while there is need for common humanitarian standards applicable to all persons in all situations, there is also need to address the specific needs of the internally displaced. For the Representative there was no conflict or competition between the development of the normative framework for the internally displaced and the draft declaration of minimum humanitarian standards. On the contrary he considered them 'complementary' and 'mutually augmentive'.<sup>166</sup>

The experience of the draft declaration was not without its benefits for the development of the normative framework for the internally displaced. Firstly, the ongoing problems in the elaboration and adoption of the draft declaration convinced Deng that a declaration or treaty on internally displaced persons, which would inevitably require state participation in the drafting process, was clearly not the way forward. On the contrary, consensus based negotiations could easily bring the development of the normative framework to a grinding halt. Secondly, it was also considered dangerous to provide States with an opportunity to re-draft existing international law which it could then weaken and undermine. This was especially feared by the ICRC. Thus, it was decided to pursue the guiding principles option over that of a draft declaration or treaty. This also had the benefit of overcoming any remaining resistance from the Nordic States.

## **5. Conclusion**

By avoiding the traditional intergovernmental treaty-making route, the Representative has achieved, in a relatively short period of four years, the elaboration of a broad and progressive set of non-binding principles which restate more precisely the range of human rights protection available to internally displaced persons. However, precisely because of their non-binding nature and their formulation outside of the intergovernmental standard-setting process, the question arises as to the extent to which States will take the Guiding Principles seriously and the extent to which, therefore, the Principles will serve to have genuine meaning and practical effect for the internally displaced. This question is the focus of the next chapter.

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<sup>166</sup> 'Proposed Declaration on Minimum Humanitarian Standards and the Internally Displaced: Remarks by Dr. Francis M. Deng, Representative of the Secretary-General on Internally Displaced Persons.' On file with the author.



**TAKING THE GUIDING PRINCIPLES SERIOUSLY**

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As noted in Chapter 2, the implementation of binding human rights treaties which have been drafted through the traditional intergovernmental process is far from absolute and thus perhaps bodes ill for the implementation of non-binding standards such as the Guiding Principles. In fact, the extent to which States might be expected to comply with the Principles takes on added significance when one considers that in comparison to other non-binding instruments in the human rights area, which are generally adopted by a resolution of the Commission on Human Rights or the General Assembly, the Principles have not been subject to such formal intergovernmental approval. Such considerations notwithstanding, the development of the Principles and their presentation to the Commission in 1998 constitutes only a first, albeit significant step in developing the normative framework for the internally displaced. Underlining the rationale for making the process of developing the Principles as wide and inclusive as possible, including of those who would be involved in their implementation in the field, the various actors involved in formulating the Principles are now playing a fundamental role in creating what might be termed a climate of compliance through the promotion and dissemination of the Principles with a view to facilitating their practical application on the ground by Governments and other relevant actors.

In the midst of such efforts and, one might argue, because of the apparent success with which these efforts have met, a small minority of states have expressed reservations precisely in regard to the lack of formal or express governmental involvement in the drafting of the Principles the consequence of which, for the States concerned, is that the Principles lack formal intergovernmental approval and standing. These views are further discussed below, suffice to say that they should be considered with due regard for the broader political context in which they are espoused, notably the concern of such states over issues of state sovereignty and non-intervention. In addition, it should be recalled that the states in question have consented to the process through which the Principles were developed by supporting – in the sense of having not abstained from or voted against – the various Commission and General Assembly resolutions requesting the development of a normative framework, leading to the elaboration of the Principles. Moreover, irrespective of such developments at the political level, initiatives aimed at the

promotion, dissemination and application of the Principles continue to be undertaken by a range of intergovernmental, non-governmental and, significantly, governmental actors. The picture which emerges from all this is that the Principles have been increasingly well-received as witnessed in part by the pronouncements of states in a variety of intergovernmental forums.

## **1. State Responses to the Guiding Principles**

The response of states towards the Guiding Principles may reasonably be discerned from views expressed on the Principles in the different political organs of the United Nations, on both a multilateral basis through voting for resolutions adopted by those fora or on a unilateral basis through statements by individual governments, as well as bilaterally in dialogue with the Representative.<sup>1</sup>

The Commission on Human Rights was the first such organ to comment on the Guiding Principles in 1998. As noted in the previous chapter, reservations were expressed by Mexico though its position was a solitary one. Moreover, the Commission's resolution on internally displaced persons was adopted without a vote and co-sponsored by 55 states reflecting a wide geographical distribution, including other South American States. The following year, Austria and the mandate sought to have the Commission elaborate more fully on the Principles than had been

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<sup>1</sup> In addition to the bodies listed below, views on the Guiding Principles have also been expressed by states in the context of the annual meetings of the Executive Committee of UNHCR (ExCom). At its fiftieth meeting in October 1999, Norway stressed the need to ensure respect for international humanitarian law and human rights law in order to better protect internally displaced persons and referred to the Guiding Principles as a useful and welcome tool in this regard. Sweden stated that the Principles should be effectively implemented and called on UNHCR to keep the Standing Committee of ExCom informed of this matter. The United States expressed concern about the 'uneven and too often inadequate protection currently afforded' to the internally displaced, stressing that the United Nations system as well as member states must develop predictable responses for ensuring that internally displaced persons receive the care and protection they need. The work of the Representative in developing the Guiding Principles and advocating close cooperation among the relevant organisations of the United Nations, ICRC, NGOs and States was commended. The Conclusions on International Protection adopted by the meeting reiterated the relevance of the Guiding Principles to the protection and assistance of the displaced and reaffirmed support for UNHCR's role with internally displaced persons on the basis of criteria specified by the General Assembly. At the fifty-first session of ExCom in October 2000, rather unexpectedly, Cuba referred to the importance of 'continuing to scrupulously respect the Guiding Principles' and the criteria on which UNHCR can provide assistance and protection to internally displaced persons. See *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1999/47, E/CN.4/2000/83* (2000), at para.14 and *Report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2000/53, E/CN.4/2001/5* (2001), at para.19.

advisable the previous year. In resolution 1999/47, the Commission recognised that 'the protection of internally displaced persons has been strengthened by identifying, reaffirming and consolidating specific rights for their protection, in particular through the Guiding Principles'. The Commission welcomed the fact that the Representative has made use of the Principles in his dialogue with governments, intergovernmental and non-governmental organisations and requested him to continue his efforts in this regard. It also noted with appreciation that United Nations agencies, and regional and non-governmental organisations are making use of the Principles in their work and encouraged the further dissemination and application of the Principles. The resolution was adopted by consensus and sponsored by broad range of 44 states, including a number of those affected by internal displacement such as Afghanistan, Azerbaijan, Bosnia and Herzegovina, Georgia and Peru.<sup>2</sup>

In keeping with established practice, the resolution on internally displaced persons at the Commission's session in 2000 employed the language of the previous year in order to encourage its sponsorship and adoption by consensus and to good effect.<sup>3</sup> The resolution was adopted by consensus and sponsored by 46 States including, in addition to those displacement-affected states listed above, Angola and Colombia.<sup>4</sup> Moreover, the resolution went further than the previous year to the extent to which it reflected developments in the Representative's efforts to promote and disseminate the Principles by expressing appreciation for the 'dissemination and application of the Guiding Principles at regional and other seminars' and, crucially, the resolution encouraged the Representative 'to continue to initiate or support such seminars in consultation with regional organisations, intergovernmental and non-governmental organisations and other relevant institutions'. More recently, in 2001, in addition to welcoming the fact that the Representative has made use of the Principles in his dialogue with governments, intergovernmental and non-governmental organisations

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<sup>2</sup> The resolution was sponsored by 44 States, namely Afghanistan, Albania, Argentina, Austria, Australia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Cyprus, Denmark, Ecuador, Finland, Georgia, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Mauritius, Netherlands, Nicaragua, Norway, Peru, Poland, Portugal, Republic of Congo, Republic of Korea, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, United States, Uruguay.

<sup>3</sup> CHR res.2000/53.

<sup>4</sup> The resolution was sponsored by Afghanistan, Albania, Angola, Australia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Colombia, Cyprus, Denmark, Ecuador, Ethiopia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Peru, Portugal, Republic of Congo, Republic of Korea, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, former Yugoslav Republic of Macedonia, United Kingdom, Uruguay.

and requesting him to continue his efforts in this regard, the Commission went one step further, noting with appreciation that an increasing number of States, United Nations agencies, and regional and non-governmental organizations were making use of the Guiding Principles. The resolution was adopted by consensus and sponsored by 53 States, including (and reflecting the change of administration in that country) Mexico.<sup>5</sup>

As well as the Commission on Human Rights, state responses to the Principles have been expressed in the context of the 'agreed conclusions' adopted at the annual humanitarian segments of the Economic and Social Council (ECOSOC)<sup>6</sup> and in the General Assembly.<sup>7</sup> Prior to their actual completion, in 1997 the Assembly, in the context of the annual resolution on the rights of the child, invited the

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<sup>5</sup> CHR res.2001/54. The resolution was sponsored by Afghanistan, Albania, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Colombia, Costa Rica, Cyprus, Democratic Republic of Congo, Denmark, Ecuador, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Japan, Korea, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Uruguay, the United Kingdom and the United States of America.

<sup>6</sup> In its agreed conclusions 1998/2 on follow-up and implementation of the Vienna Declaration and Programme of Action, specifically in section V on 'those requiring special protection', ECOSOC commended efforts to promote a comprehensive strategy towards the internally displaced that focuses on prevention, as well as better protection, assistance and development and, in this regard, noted the progress achieved to date in developing a legal framework. ECOSOC made a more explicit reference to the Principles in its agreed conclusions 1998/1, taking note of the IASC decision of March 1998 which welcomed the Principles and encouraged its members to share them with their executive boards and their staff, especially those in the field, and to apply them in their activities on behalf of internally displaced persons. See *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1998/50, E/CN.4/1999/79* (1999), at para.15.

In its agreed conclusions of the following year, ECOSOC called on all states to apply internationally recognised norms with regard to internally displaced persons. Although it did not refer explicitly to the Principles in that specific instance it did go on to take note their use by the IASC. See *E/CN.4/2000/83* (2000), at para.13.

<sup>7</sup> See GA res.53/128 (1998) on the rights of the child, in which the Assembly urged governments to pay particular attention to the situation of refugee and internally displaced children. It called upon all States and other parties to armed conflicts to recognise the particular vulnerability of refugee and internally displaced children and called upon governments and United Nations bodies to give these situations urgent attention and to enhance protection and assistance mechanisms. Following on from this, the Assembly noted the adoption of the Principles by the IASC. At the same session, the Assembly adopted resolution 53/125 on the Office of the United Nations High Commissioner for Refugees in which it reaffirmed its support for the role of UNHCR in providing humanitarian assistance and protection to internally displaced persons subject to certain criteria and noted the relevance of the Guiding Principles. The following year, again in the context of the resolution on UNHCR (resolution 54/146), the Assembly reiterated its support for the role of the Office in providing assistance and protection to internally displaced persons and underlined 'the continuing relevance of the Guiding Principles'.

Representative to take into account the situation of internally displaced children in the preparation of the Guiding Principles.<sup>8</sup>

Due to the biennialisation of the agenda item on internally displaced persons it was not until 1999 that the General Assembly commented more specifically on the Principles. The Assembly welcomed the fact that the Representative had made use of the Principles in his dialogue with governments and intergovernmental and non-governmental organisations, and requested him to continue his efforts in that regard. Furthermore, it noted 'with appreciation' that United Nations agencies, regional and non-governmental organisations are making use of the Principles in their work and encouraged the further dissemination and application of the Principles.<sup>9</sup>

Such developments within the General Assembly can be considered particularly significant with regard to the political standing and acceptance of the Principles given that the composition of the Assembly reflects the entire United Nations membership. While the same cannot be said of the composition of the Security Council, views on the Principles expressed within and by the Council are of course significant given its primary position in the hierarchy of United Nations political bodies. Of particular note, the plight of the internally displaced has been a central concern in the Council's consideration of the issue of protection of civilians in armed conflict<sup>10</sup> during which a broad range of states have underlined the importance of a

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<sup>8</sup> GA res.52/107.

<sup>9</sup> GA res.54/167.

<sup>10</sup> In addition to referring to the Principles within the context of the protection of civilians in armed conflict, the Security Council has also had cause to discuss them under other agenda items. In its debate on protection for humanitarian assistance to refugees and others in conflict situations, Kenya referred to the importance for both States and non-state actors to comply with existing international legal instruments designed to assist and protect civilian populations from harm and that outline urgent measures to ensure that refugees, displaced persons and other affected people in conflict situations have access to international protection and assistance. In this regard, Kenya welcomed the Guiding Principles (See S/PV.3932).

In March 2000, in its discussion on 'maintaining peace and security: humanitarian aspects of issues before the Security Council', the United States Ambassador to the United Nations, Richard Holbrooke, referring to the need for peacekeepers 'to know the fundamental facts in assessing human displacement', stated that peacekeepers must be educated on and familiar with the 1951 Convention Relating to the Status of Refugees and also the Guiding Principles (See S/PV.4110). Later that month in an address to Cardozo School of Law, Ambassador Holbrooke stated that '[w]e need to work harder to implement the Guiding Principles' noting that the Security Council should continue to refer to them in its resolutions where relevant. See USUN Press Release, 'Statement by Ambassador Richard C. Holbrooke, United States Permanent Representative to the United Nations, Cardozo Law School, New York, March 28, 2000' (28 March 2000).

normative framework for ensuring their protection and have become increasingly explicit about the positive role of the Principles in this regard.<sup>11</sup>

The outcome of the Security Council's initial consideration of this issue was a request for a report from the Secretary-General containing concrete recommendations on ways in which the Council could improve the physical and legal protection of civilians in situations of armed conflict, including by identifying contributions that the Council could make towards effective implementation of existing humanitarian law and examining whether there are significant gaps in existing legal norms. In his subsequent report, the Secretary-General identified internal displacement as one of the key areas in which there were gaps in existing international law.<sup>12</sup> The Secretary-General recommended therefore that in situations of mass displacement the Security Council encourage States to follow the legal guidance provided in the Principles<sup>13</sup> - a recommendation that received an overall positive response from the Council.<sup>14</sup>

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<sup>11</sup> During its initial debate on this issue, Canada rather tamely highlighted the emergence of 'new standards' to address the changing nature of conflict, such as with regard to the internally displaced. The United Kingdom praised the codification of principles regarding internally displaced persons and stressed the need for a mechanism to ensure their observance. Gambia expressed the hope that the international community would adopt an appropriate framework for internally displaced persons. See S/PV.3977.

<sup>12</sup> *Report of the Secretary-General on the protection of civilians in armed conflict*. S/1999/957 (1999).

<sup>13</sup> See recommendation 7. The same recommendation appears in the *Report of the Secretary-General on children and armed conflict*. S/2000/712-A/55/150 (2000).

<sup>14</sup> During the Council's consideration of the report in September 1999, Finland, speaking on behalf of the European Union (EU) Member States, as well as Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia, supported wider use of the Guiding Principles in the work of the United Nations at the country level. India, in its first formal comments on the Principles and with reference to recommendation 7 of the report, stated that the Principles have been presented to the Commission but have no further intergovernmental approval and, this being the case, 'simply as a matter of formal procedure, it is improper to encourage the Security Council to encourage States to follow these principles, particularly because internal displacements are problems that are the responsibility of the States concerned, and matters primarily within their sovereign jurisdiction.' Significantly, however, India conceded that while the Principles lacked wide *formal* international acceptance, nonetheless it could not 'cavil at them', i.e., dismiss them as irrelevant (see S/PV.4046).

During its third debate on the issue in March 2000, the EU and associated states again came out strongly in support of the Secretary-General's recommendation regarding the Principles and also encouraged the Council to contribute to an increased awareness among member states of the importance of the Principles and to examine what possible role it could play with regard to the protection of the internally displaced persons and the dissemination of the Principles. The Republic of Korea expressed its support for the Secretary-General's recommendation for wider use of the Principles in the work of the United Nations; and New Zealand referred to states having no excuse for not following principles of human rights law and the legal guidance based on them as contained in the Guiding Principles (see S/PV.4130).



Given the increasing references within the Council to the utility of the Principles it was perhaps not surprising that it would later formally acknowledge the Principles, albeit in a rather limited manner, as occurred in January 2000. In a statement adopted by consensus and issued by the Presidency of the Council concerning humanitarian assistance to refugees in Africa, the Council noted that United Nations agencies, regional and non-governmental organizations, in cooperation with host countries, are making use of the Guiding Principles, *inter alia*, in Africa.<sup>15</sup> Later that month, the Council adopted a resolution on Burundi in which it reiterated the language of the Presidential statement as concerns the Principles.<sup>16</sup>

Views on the Principles have also been expressed within the context of the Representative's bilateral dialogues with states during his country missions. The Representative's mission to Azerbaijan was the first mission to be undertaken following the completion of the Principles. The Representative's use of the Principles as the basis for his dialogue with national and local Government officials was reportedly well-received. For example, the Minister of Justice, noting that protection for internally displaced persons requires the incorporation of their rights into national legislation, welcomed the Guiding Principles as a valuable reference for use within the national legislative framework.<sup>17</sup>

During his follow-up mission to Colombia in May 1999, a number of government officials discussed with the Representative an analysis of the situation of internal displacement in the country that they had undertaken on the basis of the Principles.<sup>18</sup> In addition to the actual mission, analyses of the various phases of displacement were also provided within the context of a national seminar on the Guiding Principles in which representatives of the Government participated, along with local and international NGOs, United Nations agencies and representatives of internally displaced communities. The Final Declaration of the seminar reiterated

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<sup>15</sup> S/PRST/2000/1. During the debate on this item, a number of states spoke on the internal displacement issue and the current lack of a legal framework and the role of the Principles in this regard. Bangladesh, while noting that the primary responsibility for the protection and assistance of the internally displaced rests with the Government concerned, also acknowledged the attempts of the United Nations to formulate guidelines to assist the internally displaced and called for further work in this regard. Namibia meanwhile stated that it took account of the Principles in view of the absence of an international legal framework guiding the protection of internally displaced persons. (S/PV.4089).

<sup>16</sup> SC res.1286 (2000)

<sup>17</sup> E/CN.4/1999/79, at para.22.

<sup>18</sup> *Report of the Representative of the Secretary-General on internally displaced persons submitted in accordance with Commission resolution 1999/47. Addendum. Profiles in displacement: follow-up mission to Colombia.* E/CN.4/2000/83/Add.1 (2000), at para.7.

the importance of the application of the Guiding Principles in the Colombian context, noting that they set out the minimum standards that should be respected and guaranteed, and stressed the need for the Principles to be put into practice. Government representatives at the workshop pledged to hold meetings with local NGOs to develop strategies for doing so.<sup>19</sup>

While the Principles have clearly been received positively by a broad range of states, this has been by no means absolute. Indeed, from September 1999 onwards two states in particular – Egypt and India – began to express reservations about the Principles, specifically with regard to the fact that they had not been formulated through the more traditional intergovernmental process. For the States concerned this meant not only that the Principles lacked formal standing but that as such it was inappropriate for United Nations bodies such as the Security Council or the IASC to recommend their use.

These concerns came to the fore with greatest practical effect during the third humanitarian segment of ECOSOC in July 2000 and most publicly at the General Assembly in 2000 (see below). However, the initial signs of what lay ahead were first apparent during the Security Council's debate on the protection of civilians in armed conflict. In September 1999, India underlined for the Council the fact that while the Principles had been presented to the Commission on Human Rights they had no further intergovernmental approval and it was, therefore, inappropriate to recommend that the Council encourage states to follow the Principles. Interestingly though, its opposition to the use of the Principles in this manner notwithstanding, India nonetheless conceded that while the Principles lacked wide 'formal' international acceptance, they could not dismiss them as irrelevant.<sup>20</sup>

The Security Council returned to the issue of protection of civilians in armed conflict in March 2000. While a number of states spoke in support of the Principles,<sup>21</sup> Egypt stated that in legal terms internally displaced persons do not constitute a totally separate category but are civilians for whom international human rights law and conventions provide appropriate protection. As far as Egypt was concerned, it was a question of ensuring respect for human rights conventions, rather than 'the

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<sup>19</sup> See Brookings Institution, GAD, USCR, *Internal Displacement in Colombia: Workshop on Implementing the Guiding Principles on Internal Displacement. Summary Report. May 27-29, 1999. Bogota, Colombia* (1999).

<sup>20</sup> See note 14 above.

<sup>21</sup> Ibid.

invention of new norms to protect one particular category of civilians to the exclusion of others.<sup>22</sup> Of course, Egypt is correct to assert that the internally displaced are not a totally separate category in legal terms but are civilians and as such are entitled to the protection afforded by international human rights conventions. Egypt is also correct to emphasise the need to ensure respect for existing international human rights instruments. However, the assertion that existing international human rights law provides appropriate protection to the internally displaced is open to question, especially in situations of armed conflict. Indeed, as the compilation and analysis of legal norms confirmed, international law (in this sense taken to refer to human rights law *and* international humanitarian law to which Egypt does not refer) as it relates to the internally displaced is not fully comprehensive in scope and gaps and grey areas exist, hence the need to develop the Principles.

India's approach to the Principles in September 1999 was evident also during the Council's consideration of the report of the Secretary-General on children and armed conflict in July 2000. Among the report's recommendations was that the Council call upon parties to armed conflict to adhere to the Guiding Principles.<sup>23</sup> The EU and associated states<sup>24</sup> referred to the importance of assisting internally displaced children and in this sense recalled the importance of the Guiding Principles.<sup>25</sup> India, by contrast, referring both to the Secretary-General's above-mentioned recommendation and informal discussions which had taken place earlier that month during the third humanitarian segment of ECOSOC (see below), once again underscored the fact that the Principles lack formal intergovernmental approval and are not legally binding.<sup>26</sup>

It was during the third humanitarian segment of ECOSOC in July 2000 that the concerns of Egypt and India came to the fore in a particularly counter-productive manner. During informal discussions on the agreed conclusions for that year, the opposition of these states to any reference to the Principles accounted in part but not exclusively for the lack of consensus on agreed conclusions for that year. To some extent this was either ironic or predictable or a combination of the two, as this third humanitarian segment particularly focused on the issue of internal

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<sup>22</sup> S/PV.4130, resumption 1.

<sup>23</sup> A/55/163-S/2000/712, recommendation 21.

<sup>24</sup> Namely, Bulgaria, Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey.

<sup>25</sup> S/PV.4176.

<sup>26</sup> S/PV.4176, resumption 1.

displacement within the much broader theme of 'strengthening the coordination of humanitarian response and the role of technology in mitigating the effects of natural disasters and other humanitarian emergencies, including conflicts, with particular reference to the related displacement of persons' – the lengthy title of the theme itself reflecting the divergent opinions between the Group of 77 (G77) and the Western group over the choice of theme for the humanitarian segment. The G77 wanted to focus on the 'the role of technology in mitigating natural disasters' while the Western group preferred to focus on conflict-induced displacement.

Although the opposition of Egypt and India to the Principles manifested itself with greatest practical effect at ECOSOC by contributing to the absence of any tangible outcome from that year's humanitarian segment, it was in the General Assembly in 2000 that their opposition to the Principles was manifested most publicly, notably in the context of the annual resolution on the Office of the United Nations High Commissioner for Refugees. At its two previous sessions the Assembly had adopted this resolution by consensus and in it had referred to the role of UNHCR with regard to the internally displaced and the relevance of the Guiding Principles.<sup>27</sup> However, at the Assembly's session in 2000, agreed language from previous years proved an anathema to Egypt and India. During the Third Committee's consideration of the draft resolution, Egypt called for a vote on the specific operative paragraph which referred to the 'continuing relevance of the Guiding Principles' on the grounds that it found it difficult to agree to language which emphasised the Principles. Egypt requested the sponsors to delete that language or, alternatively, to include language that took into consideration the developments at ECOSOC. Neither course of action was forthcoming, hence Egypt's call for a vote. India for its part reiterated that the Principles lacked formal governmental approval and were not binding and therefore considered the language in the resolution to be out of place and the resolution as trying to confer on the Principles a profile which they did not deserve. In the event, the Third Committee adopted the paragraph in question with 118 states voting in favour, none against and 31 abstentions. In effect, Egypt's actions had served only to demonstrate the broad extent of support for the Principles among states.

Undeterred by the result of the vote in the Third Committee, Egypt also requested a vote on the paragraph during the consideration of the draft resolution in the plenary.

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<sup>27</sup> See note 7 above.

The result of the vote demonstrated even broader support for the Principles than was evident in the Third Committee, with 139 states voting in favour, none against and 31 abstentions.<sup>28</sup> While the increased support was due to some extent to votes from states which had been absent during the Third Committee vote, it should also be noted that Benin, Kenya and Nicaragua chose to vote in favour of the paragraph in the plenary having abstained in the Third Committee.

Although the events at ECOSOC and the General Assembly could be interpreted as giving some cause for concern as to the standing and future use of the Principles, it would seem pertinent to consider such events within the broader international political context in which they occurred, in particular the concern among a number of states such as Egypt and India as to the durability of the principle of state sovereignty. The focus at ECOSOC on a theme such as internally displaced persons - by definition central to conceptions of state sovereignty - was possibly regarded as a deliberate if not provocative attempt to continue the humanitarian intervention debate from the fifty-fourth session of the General Assembly in which the Secretary-General, against the backdrop of military intervention in the Federal Republic of Yugoslavia and East Timor, called on states to accept the necessity of intervention wherever citizens are threatened by conflict and massive violations of human rights.<sup>29</sup> The development of the Principles outside of the traditional intergovernmental standard-setting process and their role as a benchmark against which to measure the treatment of internally displaced persons (that is to say those who may at some point require international intervention), was cast in the light of seeking to further undermine state sovereignty. Importantly, it should be noted that the concerns of Egypt and India have been levelled at the *process* of developing the Principles and not at their *substantive content* which has never actually been called into question by states.

That the Principles have been seized upon by India and Egypt as a lightning rod with which to counter a broader grievance is also apparent when one considers that their reaction to the Principles at ECOSOC and the General Assembly was belated and to some extent contradictory. Both states have voted for, or at least not

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<sup>28</sup> See UN Press Release (10 November 2000).

<sup>29</sup> According to the Secretary-General, the core challenge to the Security Council and to the United Nations as whole in the next century is 'to forge unity behind the principle that massive and systematic violations of human rights - wherever they may take place - should not be allowed to stand.' See 'Secretary-General presents his annual report to the General Assembly', Press Release, Secretary-General/SM/7136 GA/9569 (20 September 1999). See also 'Two Concepts of Sovereignty', *The Economist*, 18 September 1999.

abstained from nor voted against the Commission and General Assembly resolutions which encouraged the development of the normative framework and the Guiding Principles; which have welcomed the fact that the Representative has made use of the Principles in his dialogue with governments, intergovernmental and non-governmental organisations; which requested him to continue his efforts in this regard; which noted with appreciation that United Nations agencies, and regional and non-governmental organisations are making use of the Principles in their work; and which have encouraged the further dissemination and application of the Principles. In addition, Egypt has supported decisions by African regional bodies to disseminate the Principles,<sup>30</sup> while India has acknowledged in the Commission on Human Rights (including at its 2001 session which took place subsequent to ECOSOC and the 2000 session of the General Assembly) that the Principles could serve as useful guidelines for states when required.<sup>31</sup> Moreover, it is unclear why Egypt would call for what was for all intents and purposes a vote on the Principles in the Third Committee and again in the plenary of the General Assembly and then abstain rather than vote against the Principles - as indeed did India which in the Third Committee had referred to the agreed language from that and previous years as being out of place and an attempt to confer on the Principles a profile which they did not deserve.

Overall, the position of Egypt and India on the Principles appears to be an isolated one. Indeed, the voting in the General Assembly clearly demonstrated substantial and broad support for the Principles. Furthermore, among those supporting the Principles were a significant number of states confronted by serious situations of internal displacement.<sup>32</sup> Moreover, irrespective of the developments at ECOSOC

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<sup>30</sup> The OAU Ministerial Meeting on Refugees, Returnees and Displaced Persons in Africa, held in Khartoum in December 1998, recommended that the Guiding Principles be submitted to the OAU Commission on Refugees at its next session which was, in turn, to submit its conclusions to the OAU Council of Ministers. The thirtieth session of the OAU Commission on Refugees in June 1999 saw a call for increased awareness in Africa of the Principles, with the suggestion that a promotional campaign be launched by the OAU and other relevant actors to that end. Seminars, workshops and round tables on the Principles were encouraged as part of this promotional campaign. The OAU Commission on Refugees ended its discussion of the item by taking note with interest and appreciation of the Guiding Principles. This decision of the OAU Commission on Refugees was later submitted to the OAU Council of Ministers at its seventieth ordinary session held in Algiers in July 1999. The OAU Secretary-General, in his report on the thirtieth session of the Commission on Refugees on the situation of refugees, returnees and displaced persons in Africa, highlighted the decision of the OAU Commission taking note of the Guiding Principles with interest and appreciation. See E/CN.4/1999/79 (1999), at paras.19-20.

<sup>31</sup> See note 14 above.

<sup>32</sup> For example, in the Third Committee, Angola, Armenia, Azerbaijan, Bosnia and Herzegovina, Colombia, Croatia, Cyprus, Democratic Republic of Congo, Eritrea, Ethiopia,

and the General Assembly, efforts to promote, disseminate and implement the Principles continue to be undertaken by intergovernmental and regional organisations, NGOs and, importantly, given that the primary responsibility for addressing the needs of the displaced is that of the national authorities, Governments.

## **2. Creating a Climate of Compliance**

As indicated in the previous chapter, throughout the process of developing the Guiding Principles there was an awareness on the part of the Representative and the legal team of the need to make the process as inclusive as possible of those actors who would be key to giving the Principles practical effect in the field. Underlining that rationale, the various intergovernmental, regional, and NGO actors who were brought into the process at different stages are now playing key roles in the promotion and dissemination of the Principles at the international, regional and national levels and in encouraging their implementation in the field.

### **2.1 At the International Level**

Pursuant to the IASC's decision of March 1998, welcoming the Principles and encouraging its members to share them with their executive boards and their staff, especially those in the field, and to apply them in their activities on behalf of internally displaced persons, members of the IASC have undertaken various efforts to disseminate and promote the application of the Guiding Principles. Some of the more immediate efforts of IASC members were elaborated upon in their statements before the Commission on Human Rights in 1998, as noted in the previous chapter. Since then, however, additional concrete actions have been undertaken both by the IASC and its individual members.

The Emergency Relief Coordinator, who chairs the IASC, wrote to the United Nations resident/humanitarian coordinators, in their capacity as field focal points for internally displaced persons, encouraging them to disseminate the Principles widely to United Nations field staff as well as to governmental and non-

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Federal Republic of Yugoslavia, Georgia, Mexico, Peru, the Philippines, the Russian Federation, Rwanda, Turkey, and Uganda all voted in favour of the paragraph. In the plenary, these states were joined by Afghanistan, Burundi, Republic of Congo, the Solomon Islands, and Tajikistan, all of whom had been absent during the vote in the Third Committee.

governmental partners.<sup>33</sup> In December 1999, the IASC endorsed a policy paper on the protection of internally displaced persons which seeks to develop an inter-agency framework for providing protection to the displaced. The paper defines protection on the basis of the standards contained in the Principles and identifies a number of areas of activity aimed at ensuring that these standards are met, including dissemination and promotion of the Principles.<sup>34</sup> The policy paper has been followed by 'Supplementary Guidance to Resident/Humanitarian Coordinators on their Responsibilities in Relation to Internally Displaced Persons' which was endorsed by the IASC in April 2000. The Supplementary Guidance refers to the Guiding Principles as 'fundamental to a comprehensive response to the protection and assistance needs of [internally displaced persons] in all phases of displacement'.<sup>35</sup> The Guiding Principles are also at the centre of an inter-agency training package which is being developed for field based staff, aimed at promoting the Guiding Principles and increasing sensitivity to the protection, assistance and development needs of internally displaced persons and to improve responses to those needs.

In light of renewed focus from January 2000 onwards on inter-agency arrangements for responding to internal displacement, following the remarks of the United States Ambassador to the United Nations that the collaborative approach<sup>36</sup> favoured by

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<sup>33</sup> E/CN.4/1999/79, at para.25.

<sup>34</sup> See *Protection of Internally Displaced Persons – Inter-Agency Standing Committee Policy Paper* (December 1999).

<sup>35</sup> *Supplementary Guidance to Humanitarian/Resident Coordinators on their Responsibilities in Relation to Internally Displaced Persons* (April 2000), at para.6.

<sup>36</sup> There is no single organisation within the United Nations system responsible for the protection and assistance of internally displaced persons. Following his appointment, the Representative identified three options for dealing with the problem: the creation of a new organisation; the assignment of the responsibility to an existing organisation; or a collaborative approach among the different agencies, coordinated by a central mechanism. To date, the collaborative approach has been the preferred option of the United Nations system. However, as was clear from the Secretary-General's 1997 Programme for Reform, this institutional arrangement requires strengthening so that the provision protection and assistance to internally displaced persons does not continue to fall into the gaps between the mandates of existing agencies. To address this problem, the Secretary-General conferred upon the Emergency Relief Coordinator responsibility for ensuring that the protection and assistance needs of internally displaced persons are effectively addressed by the international community within the inter-agency framework.

In an effort to focus greater attention on the protection of internally displaced persons, the IASC adopted the above-mentioned policy paper on protection which sets out a number of strategic areas of activity through which United Nations agencies and other relevant actors can seek to meet their protection responsibilities. The IASC also adopted the above-mentioned supplementary guidance to UN resident and humanitarian coordinators (RC/HCs) to facilitate their carrying out their protection and assistance responsibilities in relation to internally displaced persons. The RC/HCs are deemed responsible for coordinating the United Nations response to the protection and assistance needs of the internally displaced in



agencies and the IASC was not effective,<sup>37</sup> in September 2000 the IASC created a senior inter-agency network on internal displacement with a view to ensuring an adequate humanitarian response and appropriate coordination mechanism in regard to specific situations of internal displacement.<sup>38</sup> The Guiding Principles provide the overarching framework for the Network when assessing the provision of protection and assistance to internally displaced persons and seeking durable solutions to their

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a given country, and with ensuring that gaps in the response are systematically addressed. Encouraging and welcome though such developments are, we are still at the very early stages of translating the conceptual framework of protection into an operational reality. See further, R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 159: 'When one reviews the large number of humanitarian, human rights and development organisations that are now involved with the internally displaced, it becomes clear that capacities exist for dealing with internal displacement but that they are frequently not extensive enough or sufficiently honed to address the problem effectively.' See also E/CN.4/2001/5, at paras.62-86.

<sup>37</sup> In January 2000, having returned from a mission to Angola where he witnessed first-hand the problems confronting internally displaced persons in that country, Ambassador Holbrooke informed the Security Council that the internally displaced were for the most part 'out of reach of the international community's assistance'. Two months later, Holbrooke referred to the international coordinated response to internal displacement as 'a euphemism for ineffectiveness; it means that victims fall through the cracks. So what began as a well-intentioned effort to draw on the best resources of each UN agency to help the internally displaced ends up as tangled mess... Agencies are supposed to act together as "co-heads". In practice, however, "co-heads" means "no-heads".' Remarks in a speech at the Cardoza School of Law, New York. See note 10 above. See further ICVA, 'New Momentum for a Single Agency Mandated to Protect and Assist IDPs', *ICVA Talk Back*, Vol. 2, No. 2 (March 2000); and US Committee for Refugees, 'Internal Displacement Debate Gains Momentum', *Refugee Reports*, Vol.21, No.6 (July 2000).

<sup>38</sup> See IASC-Working Group, 'Terms of Reference: Senior Inter-Agency Network to Reinforce the Operational Response to Situations of Internal Displacement' (14-15 September 2000). The overall objective of the Network (which was originally established for an 8-9 month period) was to undertake country missions and on the basis of those missions to make recommendations to the Secretary-General and the ERC for revised inter-agency approaches to internal displacement in order to strengthen the future response. The Network's report on future arrangements was finalised in April and endorsed the following month by the Secretary-General. In particular, the report recommends the establishment of a dedicated 'IDP unit' within OCHA, consisting of staff seconded from interested agencies. The unit will be charged with, *inter alia*, monitoring situations of internal displacement globally, undertaking systematic reviews of selected countries and proposing revised approaches where appropriate, providing training, guidance and expertise, ensuring that the needs of internally displaced persons are fully taken into account in the United Nations Consolidated Appeals Process, promoting and supporting the global advocacy efforts of the Representative of the Secretary-General on Internally Displaced Persons. Of particular note, the report states that the Guiding Principles 'provide the overarching framework for the inter-agency response to [internally displaced persons], which should also seek to operationalise these principles.' See *Interim Report from the Special Coordinator of the Network on Internal Displacement* (9 April 2001). See also, ICVA, 'Moving Ahead on the IDP Debate', *ICVA Talk Back*, Vol.3, No.2 (April 2001). For a critique of the approach advocated by the Network, see Refugees International, *Towards a More Effective Response to Internal Displacement* (8 June 2001).

In consultations during the drafting of the report, UNHCR emphasised the need for the proposed unit to assist agencies in the field in operationalising the Principles, through training and lessons learned exercises. Also, the International Council for Voluntary Agencies referred to the Guiding Principles as constituting a central component of future inter-agency response. The OCHA Unit is expected to be functioning by January 2002.

plight.<sup>39</sup> Although the Network's Senior Coordinator has stated that the Network would seek to give concrete effect to the Principles at the field level,<sup>40</sup> the report of its first mission to Ethiopia and Eritrea suggested a rather minimalist approach both to the Principles and the issue of protection.<sup>41</sup> However, the reports on its subsequent missions to Burundi and Angola placed greater emphasis on the relevance of the Principles to the situation pertaining in those countries and included several recommendations regarding their dissemination, promotion and application.<sup>42</sup>

In addition to efforts at the inter-agency level, individual agencies also have undertaken various activities towards disseminating and promoting the Principles. To facilitate their wide dissemination, OCHA has published the Principles in booklet form in English, French, Spanish and Portuguese. OCHA has also posted electronic versions of the Principles in these and other language versions on the internet.<sup>43</sup> UNHCR's Division of International Protection has disseminated the Principles to all its field offices with a note encouraging all staff, including protection officers, to promote and apply them.<sup>44</sup> UNICEF has disseminated the Principles to the field and

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<sup>39</sup> As the Network's Terms of Reference point out, the Guiding Principles 'are fundamental to a comprehensive response to the protection and assistance needs of [internally displaced persons] in all phases of displacement and provide an important framework of reference for the review process'. Ibid., at para.11.

<sup>40</sup> See Brookings Institution Project on Internal Displacement, *Report of the International Colloquy on the Guiding Principles on Internal Displacement, Vienna 21-23 September 2000* (2000), at 13 (Hereinafter, Vienna Report)

<sup>41</sup> See Senior Inter-Agency Network on Internal Displacement – Mission to Ethiopia and Eritrea, 16-21 October 2000 – Findings and Recommendations (25 October 2000). The initial draft of the report failed to make any reference to the Guiding Principles.

<sup>42</sup> See Senior Inter-Agency Network on Internal Displacement – Mission to Burundi, 18-22 December 2000 – Findings and Recommendations (23 December 2000); and Senior Inter-Agency Network on Internal Displacement – Mission to Angola, 11-17 March 2001 – Findings and Recommendations. The report on Burundi, for example, recommended that all protection mandated actors should systematically engage the Government and non-state actors on the issue of protection of internally displaced persons, including reiterating the standards contained in the Guiding Principles and their responsibilities in this regard. In addition, all United Nations agencies with specific protection mandates were urged to strengthen their protection activities, including through monitoring and reporting and the active dissemination and promotion of the Guiding Principles, including their translation into local languages. In addition, the Government was encouraged to ensure that any relocation of the internally displaced for the purposes of security be undertaken in conformity with international humanitarian law and the Guiding Principles.

<sup>43</sup> Available at [www.reliefweb.int/library/](http://www.reliefweb.int/library/)

<sup>44</sup> Correspondence with Michael Kingsley, Division of International Protection, UNHCR (2 December 1998). Prior to the completion of the Guiding Principles, the Division of International Protection developed a reference manual for its field staff on the international legal standards applicable to the protection of the internally displaced, based on the first part of the compilation and analysis of legal norms. See UNHCR, *International Legal Standards Applicable to the Protection of Internally Displaced Persons: A Reference Manual for UNHCR Staff* (1996).

includes them in all its publications on internally displaced persons.<sup>45</sup> Similar efforts have been undertaken by IOM<sup>46</sup> and ICRC, with the latter organisation also using the Principles in training programmes for field staff.<sup>47</sup>

The Office of the High Commissioner for Human Rights (OHCHR) has shared the Principles with all staff, encouraging their use especially by field staff and in technical cooperation projects.<sup>48</sup> The High Commissioner for Human Rights uses the Principles in advocacy efforts in regard to specific country situations<sup>49</sup> and has referred to the Principles in relation to specific thematic concerns regarding the internally displaced.<sup>50</sup> To further enhance the promotion and protection of the rights of internally displaced persons, OHCHR included a project within the Annual Appeal for 2001, a key component of which was the translation and publication of the Principles into local languages in countries with problems of internal displacement.<sup>51</sup>

The Representative formally presented the Guiding Principles to the annual meeting of the special rapporteurs or special procedures of the Commission on Human Rights in May 1999 at which they noted the relevance and usefulness of the

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<sup>45</sup> Correspondence with Bo Viktor Nylund, Office of Emergency Programmes, UNICEF (3 and 7 December 1998).

<sup>46</sup> Correspondence with Shyla Vohra, Legal Officer, IOM (20 November 1998).

<sup>47</sup> Correspondence with Daniel Helle, ICRC (29 November 1998).

<sup>48</sup> E/CN.4/1999/79, at para.27. The Office has technical cooperation projects with a number of displacement affected States, such as Rwanda, Sierra Leone, Somalia, Sudan, Mexico, Azerbaijan, Georgia, the Russian Federation, East Timor, Indonesia and the Philippines. For the most part such projects exercise an indirect effect on the situation of the internally displaced in these countries through supporting institution-building, training of local officials and promoting respect for human rights and the rule of law. Others may involve components which will exercise a direct effect on the situation of groups of displaced persons. In Sierra Leone for example, the project includes a component on the reintegration and rehabilitation of women and girls affected by war which would also include internally displaced women and girls. See further, OHCHR, *Annual Appeal 2001* (2001) 41-72.

<sup>49</sup> For instance, in January 2000, the High Commissioner issued a press statement in which she condemned the forced relocation of the population in certain provinces in Burundi to camps where they lacked adequate shelter, access to food and water, health care and education, noting this measure as contrary to the relevant principles of international law, as restated in the Guiding Principles (HR/00/4).

<sup>50</sup> For example, in her statement to an international consultation on mental health of refugees and displaced populations in conflict and post-conflict situations, convened by the World Health Organisation (WHO) in October 2000, the High Commissioner, noting that international attention to the right to mental health of refugees and displaced persons needs to be developed further, referred to the Guiding Principles as a landmark in the international community's approach to this problem. In particular, the High Commissioner acknowledged the emphasis in the Principles on access for internally displaced persons to psychological and social services and for counseling for victims of sexual and other abuses. Reinforcing this point, a statement was delivered on behalf of the Representative which called for the integration of the Guiding Principles into the tools to be established by the consultation for monitoring and rapid assessment of the mental health needs of the displaced. WHO has committed to follow-through on this suggestion.

Principles to their work as well as the importance of mechanisms of the Commission being engaged in addressing the protection needs of the internally displaced.<sup>52</sup> To this end, a number of the special rapporteurs have addressed internal displacement issues, including making reference to the Guiding Principles, in their reports<sup>53</sup> and also in the context of urgent appeals.<sup>54</sup> The United Nations human rights treaty bodies for their part have become increasingly seized of both the internal displacement issue and the Guiding Principles.<sup>55</sup>

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<sup>51</sup> See further, OHCHR, note 48 above, at 38-40.

<sup>52</sup> E/CN.4/2000/83, para.16. There are currently 34 special procedures mandates (13 country-specific and 21 thematic mandates) several of which are concerned with issues of internal displacement. For instance, of the country mandates, 9 are concerned with countries which are affected by internal displacement, specifically, Afghanistan, Burundi, Cambodia, Democratic Republic of Congo, former Yugoslavia, Iraq, Myanmar, Somalia and Sudan. Similarly, a number of thematic mandates, in addition to that of the Representative on Internally Displaced Persons may have cause to address situations involving the internally displaced, such as the mandates on arbitrary detention, enforced or involuntary disappearances, extrajudicial, summary or arbitrary executions, torture, violence against women, the right to adequate housing, and human rights defenders. See note 53 below.

<sup>53</sup> For instance, reference has been made to the Guiding Principles in the reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Representative of the Secretary-General on children in armed conflict, the Special Representative on the situation of human rights in Rwanda, the Independent Expert on the situation of human rights in Somalia, and the Special Rapporteur on the situation of human rights in the Sudan. See *Report of the special rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1999/35*. E/CN.4/2000/3 (2000), at para.44; *Additional report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr. Olara Ottunu, submitted in accordance with General Assembly resolution 53/128*. E/CN.4/2000/71 (2000), at para.28, urging the Government of Colombia, United Nations agencies and NGOs to make the protection and assistance of internally displaced persons a priority issue and to employ the Guiding Principles; *Report on the situation of human rights in Rwanda, submitted by the Special Representative, Mr. Michel Moussalli, pursuant to Commission resolution 1999/20*. E/CN.4/2000/41 (2000), at para.214; *Report of the independent expert, Ms. Mona Rishmawi, submitted in accordance with Commission on Human resolution 1998/59*. E/CN.4/1999/103 (1999), at para.99; and *Report of the independent expert, Ms. Mona Rishmawi, submitted in accordance with Commission on Human resolution 1999/75*. E/CN.4/2000/110 (2000), at paras.51-52.

<sup>54</sup> In September 1999 a joint urgent appeal was issued in regard to the rapidly deteriorating situation in East Timor by the special rapporteurs on executions and torture, the chairman-rapporteur of the working group on arbitrary detention as well as the Representative on internally displaced persons. Attention was drawn *inter alia* to the Guiding Principles, with specific reference to their provision for protection against arbitrary displacement, protection and assistance during displacement, safe return and resettlement, and access to humanitarian assistance. See 'United Nations experts call on Indonesia to ensure protection of rights of East Timorese', press release HR/99/85 (8 September 1999).

<sup>55</sup> Of particular note, the Committee on the Elimination of Racial Discrimination has urged the Sudan to take steps to implement its obligations under the Convention on the Elimination of All Forms of Racial Discrimination. These included effective steps to protect internally displaced communities within the territory of the State party and to address the problems associated with the displacement of significant segments of the country's population due to war. In this regard, the Committee stated that the State party should consider giving effect to the provisions of the Guiding Principles (see A/54/18, para.21(5)). The Committee on the Rights of the Child, in its concluding observations on the second periodic report of Colombia, recommended that the State party give the highest priority to the protection of the rights of internally displaced children. In this regard, the Committee took into consideration the reports of the Representative on the situation in the State party and endorsed the

To promote the application of the Principles, the Representative has supported a number of initiatives providing practical guidance on them. In addition to a *Handbook for Applying the Guiding Principles on Internal Displacement*<sup>56</sup> and a *Manual on Field Practice in Internal Displacement*,<sup>57</sup> an annotated version of the Principles has been produced.<sup>58</sup>

## 2.2 At the Regional Level

Regional and sub-regional organisations have come to play an increasingly important role in the promotion and application of the Principles as recognised by the Commission on Human Rights.<sup>59</sup> In particular, the Commission has welcomed initiatives undertaken by the Organisation of African Unity (OAU), the Organisation of American States (OAS) and the Organisation for Security and Cooperation in Europe (OSCE).

The OAU Commission for Refugees, Returnees and Displaced Persons has formally expressed appreciation of the Principles,<sup>60</sup> and several OAU-sponsored seminars have emphasised the importance of the Principles in the African context.<sup>61</sup> In particular, a seminar on Internal Displacement in Africa, co-sponsored by the OAU, UNHCR and the Brookings Project, called for the wide dissemination and application of the Guiding Principles in Africa. The OAU, in its introductory statement to the conference, renewed its appreciation for the Principles and stated that it stood ready to associate itself with efforts to disseminate the Principles and further noted that the

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recommendations made therein. The Committee further recommended that the State party, in cooperation from the international community, urgently follow-up on these recommendations, in particular on the implementation of the Guiding Principles in the State party's legislation and policies on internally displaced persons. See CRC/C/15/Add.137, at paras.60-61.

<sup>56</sup> Commissioned by the Representative at the request of international organisations and NGOs and published by OCHA and the Brookings Project in 1999, the *Handbook* spells out the meaning of the Guiding Principles in non-technical language with a view to facilitating their practical application.

<sup>57</sup> Prepared under the direction of UNICEF, with the support of OCHA and the Office of the Representative, the *Manual* compiles more than sixty examples provided by IASC members and partner agencies of field programme initiatives supporting the application of the Guiding Principles. The purpose of the compilation is to stimulate practitioners in their own programme design for addressing the needs of the internally displaced.

<sup>58</sup> W. Kälin, *The Guiding Principles on Internal Displacement: Annotations* (2000).

<sup>59</sup> In resolution 2000/53, the Commission noted with appreciation that regional organisations are making use of the Principles in their work and encouraged their further dissemination and application of the Principles.

<sup>60</sup> See E/CN.4/2000/83, at paras.18-19.

<sup>61</sup> See E/CN.4/1999/79, at para.18.

Principles would provide guidance to governments and organisations when addressing the issue in the field.<sup>62</sup>

At the sub-regional level in Africa, the ministers of the Economic Community of West African States (ECOWAS) adopted a declaration at the Conference on War Affected Children in West Africa, held in Ghana in April 2000, which welcomed the Guiding Principles and called for their application by ECOWAS member states. This declaration was adopted by the ECOWAS Heads of State in December 2000.<sup>63</sup>

In the Americas, the Representative has shared the Principles with the Inter-American Commission on Human Rights of the Organisation of American States (OAS) and its rapporteur on internally displaced persons. The Commission has welcomed and expressed its full support for the Guiding Principles, noting that as the most comprehensive restatement of norms applicable to the internally displaced, they provide authoritative guidance to the Commission on how the law should be interpreted and applied during all phases of displacement. Both the Commission and its rapporteur on internally displaced persons have since begun to apply the Principles in their work.<sup>64</sup>

In Europe, the OSCE has circulated the Guiding Principles among its participating states and at its Human Dimension seminar in 1999 which dealt with the role of OSCE field missions in human rights work.<sup>65</sup> Since then, the OSCE and its Office for Democratic Institutions and Human Rights (ODIHR) have begun to focus increasingly on the application of the Principles, due in no small measure to Austria's chairmanship of the OSCE during 2000. In September 2000, ODIHR, in conjunction with Austria as Chairman-in-Office, convened a Supplementary Human

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<sup>62</sup> See *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1998/50. Addendum. Report of the workshop on internal displacement in Africa*. E/CN.4/1999/79/Add.2 (1999).

<sup>63</sup> As a follow-up to the Ghana conference, the Canadian Government convened an International Conference on War Affected Children in Winnipeg, in September 2000. The conference brought together representatives of Governments, United Nations agencies, international organisations, youth, researchers, civil society and NGOs, and the private sector. An expert's meeting held during the conference adopted a Framework for Commitment to War-Affected Children which outlined a number of commitments for Governments and other actors which were considered essential for the protection of the rights of children in conflict. These included adherence to the Guiding Principles with a view toward preventing forced displacement and providing protection and assistance during displacement.

<sup>64</sup> See, for example, Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia* (26 February 1999), chap.IV.

<sup>65</sup> E/CN.4/2000/83, at para.21.

Dimension Meeting on Migration and Internal Displacement. A principal goal of the seminar was to elaborate ways in which OSCE institutions, field operations and participating states could enhance their response to internal displacement, in particular through the practical application of the Guiding Principles. Among its recommendations, the meeting called for the integration of the issue into the activities of the OSCE, using the Principles as a framework for doing so. It also recommended that heads of field missions evaluate their operational activities according to the Principles, and that these also be used to monitor and review new and protracted situations of displacement.<sup>66</sup> ODIHR has also begun to apply the Principles in the context of its election monitoring activities.<sup>67</sup>

Also at the European level, the Council of Europe has become increasingly engaged with the internal displacement issue, in particular through the activities of the Parliamentary Assembly. For example, the Assembly's Committee on Migration, Refugees and Demography has sought to address situations of internal displacement such as by undertaking fact-finding missions to displacement-affected countries and recommending respect for the Guiding Principles.<sup>68</sup>

Remaining on the regional theme, active promotion of the Guiding Principles at the regional and country levels is being undertaken through a series of workshops hosted by the Representative in partnership with intergovernmental, regional and non-governmental organisations. The Commission on Human Rights has expressed its appreciation for these efforts and has encouraged the Representative to continue to initiate or support such seminars in consultation with these

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<sup>66</sup> See OSCE/ODIHR, *Supplementary Human Dimension Meeting: Migration and Internal Displacement. Vienna, 25 September 2000. Final Report* (2000). Two months later, at the eighth meeting of the OSCE's Ministerial Council, the Chairperson-in-Office, in a closing statement, referred to the 'serious concern' expressed at the meeting about the plight of refugees and internally displaced persons within the OSCE region. Support was expressed for the dissemination of the Guiding Principles within the OSCE and their further use in the relevant activities of the organisation. See Statement by Dr. Benita Ferrero-Waldner, Chairperson-in-Office of the OSCE, at the closing plenary session of the eighth meeting of the Ministerial Council, 28 November 2000. OSCE doc. MC.DEL/149/00 (29 November 2000).

<sup>67</sup> See for example, OSCE/ODIHR, *Georgia: Parliamentary Elections, 31 October and 14 November 1999. Final Report* (7 February 2000).

<sup>68</sup> See *Report of the Committee on Migration, Refugees and Demography, concerning the Conflict in Chechnya*, doc. 8632 (25 January 2000). In an effort to increase the Council's involvement with the issue and its use of the Guiding Principles, the Office of the Representative is seeking to enhance its cooperation with the Council. In October 2000, the Committee invited the Representative to introduce the Guiding Principles at its meeting in Paris and plans are underway for a joint seminar on internal displacement in Europe and the application of the Guiding Principles in the autumn of 2001. See E/CN.4/2001/5, para.43.

organisations and other relevant institutions.<sup>69</sup> Reference has been made already to the workshops convened in Addis Ababa and Bogota. Other such workshops have been organised in Bangkok for the Asia region<sup>70</sup> and in Georgia for the South Caucasus region.<sup>71</sup> Additional regional level workshops are planned for 2001, with regard to the European region, in conjunction with the Council of Europe, and for Southern Africa in collaboration with the South African Development Community.

### 2.3 At the National Level

While international and regional bodies and mechanisms have an important role to play in disseminating and promoting implementation of the Guiding Principles, their efforts in this regard should ultimately be subsidiary and supplementary to efforts at

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<sup>69</sup> See CHR res.2000/53 and 2001/54.

<sup>70</sup> The 'regional conference on internal displacement in Asia' was convened in February 2000 and hosted by Forum Asia and the University of Chulalongkorn and sponsored by UNHCR, the Brookings Project, the Norwegian Refugee Council and the U.S. Committee for Refugees. Participants came from 16 Asian and other countries and included representatives of national human rights commissions, academic and research institutions, local, regional and international NGOs, media and international organisations. Participants welcomed the Guiding Principles, noted the positive contribution they could make in promoting protection and assistance, and urged their observance by all concerned parties - governments, insurgent groups, humanitarian and development organisations, international financial institutions, multinational corporations, and NGOs. To promote greater attention to dealing with internal displacement in Asia, participants put forward several proposals, including a greater focus by national human rights institutions (NHRIs) on the rights of internally displaced persons, including pressing for observance of the Guiding Principles and the introduction of the Guiding Principles into the Asia Pacific Forum for National Human Rights Institutions (ASPAC) - which subsequently took place in August 2000 - to ensure that each NHRI becomes aware of the Principles. See Brookings Institution Project on Internal Displacement, *Final Report of the Conference on Internal Displacement in Asia, Bangkok, Thailand, February 22-24, 2000* (2000).

<sup>71</sup> Convened in May 2000 and co-sponsored by ODIHR, the Brookings Project and NRC. Attended by representatives of the Governments of Armenia, Azerbaijan and Georgia, the Representative, international organisations, national NGOs and international experts, the workshop used the Guiding Principles as the basis for discussing strategies for addressing situations of internal displacement in the region. Participants welcomed the Principles as a useful restatement of international law pertaining to the internally displaced, as well as an instrument providing clear guidance in cases where existing international law contains grey areas. During the workshop, a group of local NGOs produced a statement calling for the development of a common framework for local and international agencies and organisations for promoting the Guiding Principles in the region; the creation of local country-level mechanisms to monitor the internal displacement situation, based on the Principles; and the continued dissemination of the Principles among internally displaced communities and the society at large through education, training and monitoring. See further, Brookings Institution Project on Internal Displacement, *Summary Report of the Regional Workshop on Internal Displacement in the South Caucasus, Tbilisi, Georgia, May 10-12 2000* (2000). The report is contained also in document E/CN.4/2001/5/Add.2. Following the workshop, ODIHR and the Brookings Project agreed to support a project to be undertaken by a group of local lawyers to review national legislation and administrative procedures in the states of Armenia, Azerbaijan and Georgia on the basis of the Principles and then to assess the extent to which reforms might be needed in the laws and regulations to achieve compliance with international standards.



the national level. In this connection, a number of developments have taken place at the national level which have bearing on the standing of the Guiding Principles in domestic law and policy.

In Colombia, the Constitutional Court has delivered a number of judgments which cite the Guiding Principles in support of actions in favour of the internally displaced on the grounds – according to the Court – that the Principles clarify the gaps and grey areas in existing international law and have been widely accepted by international human rights organisations and should, therefore, be used as the parameters for the creation of rules and for the interpretation of the national law on forced displacement.<sup>72</sup> In addition, the Office of the President of Colombia cites the Principles as the foundation of its integrated policy for internally displaced persons and, subsequent to the Representative's follow-up mission to the country in 1999, the Ombudsman's Office has included the Principles in its public awareness campaign about internal displacement, and the *Red de Solidaridad Social*, the government agency focusing on internal displacement, has included the Principles in its book, *Attention to the Population Displaced by the Armed Conflict*. Furthermore, the Colombian Ministry of Health and the Pan American Health Organization are planning to translate the *Handbook for Applying the Guiding Principles* into Spanish so as to promote its use in Colombia.<sup>73</sup>

In Angola, the Guiding Principles formed the basis for the minimum standards to be applied in the resettlement of internally displaced persons, as developed by the Government in cooperation with United Nations agencies in the summer of 2000. In October 2000 these standards were formally adopted in a decree of the Council of Ministers as norms on the resettlement of internally displaced persons and which refers to the Guiding Principles as establishing general principles governing the treatment of internally displaced persons.<sup>74</sup> During the Representative's mission to Angola in November 2000, the Ministry of Social Assistance and Reintegration (MINARS) convened a half-day workshop to discuss the development of the above-mentioned norms on resettlement and other initiatives undertaken in Angola in support of the Guiding Principles.

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<sup>72</sup> See the Court's judgements in cases T-227/97 and T-186589/T-201615/T-2459. Cited in E/CN.4/2001/5, at para.29.

<sup>73</sup> See E/CN.4/2001/5 (2001), at para.29.

<sup>74</sup> 'Conselho de Ministeros, Decreto No. 1/01 de 5 Janeiro, Normas sobre o reassentamento das populacoes deslocados' *Diário da República* (5 de Janeiro de 2001). On file with the author.

One of the major recommendations to result from the Representative's mission to Angola was the need for a more active and focused approach to the protection of the internally displaced by the Government and the international community.<sup>75</sup> Subsequent to the Representative's mission, the United Nations Country Team in Angola has developed a protection strategy based on the promotion of and ensuring compliance with the Guiding Principles and the Norms on Resettlement. A key feature of the strategy is the development of provincial protection plans which involves a joint Government and United Nations training group composed of representatives from the military judiciary, Attorney-General's office, national police, MINARS, UNHCR and OCHA conducting protection training in the provinces with the aim of assisting their counterparts at the provincial level to develop provincial protection plans. Participants identify the specific problems in their province on the basis of the Guiding Principles and the steps which need to be taken and by whom to address these problems. The results of this process are incorporated into a protection plan specific to that particular province which is adopted by the participants on the basis of consensus and signed by the provincial governor and as such provides something against which to hold the Governor at least politically accountable. Implementation of the plans is monitored at the provincial level by OCHA-led teams and at the national level by a joint technical group composed of United Nations agencies. In addition, the plans themselves provide for the establishment of Human Rights Committees to monitor and promote their implementation.<sup>76</sup>

To support these efforts the United Nations country team has also established a system for information collection and monitoring the conditions of the internally displaced at the local level. The system involves regular interviewing with displaced persons in camps by OCHA field advisors using a questionnaire based on the Norms on Resettlement and the Guiding Principles.<sup>77</sup>

In Burundi, following a visit by the Senior Inter-Agency Network on Internal Displacement, the Government, in collaboration with the United Nations Country

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<sup>75</sup> *Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2000/53. Addendum. Profiles in displacement: Angola, E/CN.4/2001/5/Add.5 (2001), at para.88.*

<sup>76</sup> OCHA, *Reference Brief: Mission to Angola. Senior Inter-Agency Network on Internal Displacement, 12-17 March 2001.*

<sup>77</sup> *Ibid.*

Team, established in February 2001 a 'Permanent Framework for the Protection of Internally Displaced Persons'. The Permanent Framework comprises two bodies – a Committee for the Protection of Displaced Persons and a Technical Group for Follow-Up – whose monitoring and remedial actions in support of the displaced are to be undertaken within the framework provided by the Guiding Principles. The Protocol establishing the Permanent Framework, as signed by the Government and the United Nations Humanitarian Coordinator, states in the preamble that '[c]onscious that the Government of Burundi and the international community are bound by the Guiding Principles'.<sup>78</sup>

The initiatives undertaken in Angola and Burundi were discussed by representatives of the respective Governments during an open-meeting on using the Guiding Principles, convened during the Commission on Human Rights in 2001. Also present was a representative of the Georgian Government who referred to the efforts of his Government to bring the certain provisions of domestic legislation, such as those concerning voting rights, into line with the standards contained in the Principles, in light of the recommendations made by the Representative following his mission there in May 2000.<sup>79</sup> In addition, during the Commission's consideration of the agenda item on internally displaced persons, the representative of Georgia stated that the Principles have been received most positively by his Government and are actively being promoted, including through their translation into local languages.<sup>80</sup> Remaining in the South Caucasus, note should also be taken of the translation of the Guiding Principles into Armenian by the Government of that country and their dissemination to all relevant ministries and national NGOs, as well as educational institutions.<sup>81</sup>

A number of Governments have requested and/or participated in country-based training and other seminars on the Guiding Principles. One such seminar was convened in Kampala at the request of the Government of Uganda in March 1999, with the support of OHCHR and the Norwegian Refugee Council.<sup>82</sup> NRC has since

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<sup>78</sup> 'Protocole relatif à la création d'un cadre permanent de concentration pour la protection des personnes déplacées' (7 February 2001). On file with the author.

<sup>79</sup> *Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2000/53, Addendum. Profiles in displacement: Georgia*, E/CN.4/2001/5/Add.4 (2001), at paras.59-69.

<sup>80</sup> Commission on Human Rights, 57<sup>th</sup> session, statement by the Permanent Representative of Georgia, 12 April 2001. On file with the author.

<sup>81</sup> E/CN.4/2001/5, at para.31.

<sup>82</sup> Workshop participants, which included Ugandan political and military authorities, local NGOs and human rights experts, representatives of internally displaced communities and

convened similar training workshops on the Guiding Principles in the Philippines,<sup>83</sup> Thailand (aimed at NGOs from Myanmar),<sup>84</sup> Angola,<sup>85</sup> Georgia,<sup>86</sup> Sierra Leone and Colombia, all of which have involved the participation of government personnel with the exception of the workshop in Thailand. In the case of Colombia, the workshop was organised with the National and Regional Human Rights Ombudsman's Office and involved the participation of 45 recently elected municipal human rights ombudsmen.<sup>87</sup>

Efforts to promote the implementation of the Guiding Principles at the national level are also being pursued through national human rights institutions (NHRIs).<sup>88</sup> The above-mentioned regional conference on internal displacement in Asia proposed that NHRIs focus on the rights of the internally displaced, press for the observance of the Guiding Principles and promote specific steps to protect internally displaced persons. In August, the Asia-Pacific Forum of National Human Rights Institutions

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international humanitarian and development agencies, agreed that the Guiding Principles should be disseminated widely to all relevant actors and foremost to the authorities and the internally displaced themselves. To facilitate dissemination efforts, the workshop recommended that the Guiding Principles and international human rights standards be translated into local languages and that radio programmes to raise awareness of the Principles be developed. The holding of local-level training workshops on the Guiding Principles and human rights for the military, representatives of internally displaced communities, church leaders, NGOs and the population at large were advocated. The international community was requested to assist such promotion and training activities through the mobilisation of resources and the provision of technical assistance.

<sup>83</sup> NRC, *Workshop on the UN Guiding Principles on Internal Displacement: Quezon City, Philippines 22-24, November 1999* (1999).

<sup>84</sup> NRC, *Internal Displacement Among Burmese Ethnic Groups. Report of a Seminar on the Guiding Principles, Burma, March 2000* (2000).

<sup>85</sup> NRC, *Workshop on the UN Guiding Principles on Internal Displacement: Luanda, Angola 29-31 August 2000* (2000).

<sup>86</sup> NRC, *Workshop on the UN Guiding Principles on Internal Displacement: Borjomi, Georgia 13-15 November 2000* (2000).

<sup>87</sup> Telephone interview with Bjorn Petersson, NRC Geneva, 11 June 2001.

<sup>88</sup> NHRIs have come to play an increasingly important role in the promotion and protection of human rights. For example, in its resolution 2000/76 the Commission on Human Rights welcomed the rapidly growing interest worldwide in the creation and strengthening of independent, pluralistic national institutions for the promotion and protection of human rights and convinced of the important role such institutions play in promoting and protecting human rights and fundamental freedoms and in developing and enhancing public awareness of international human rights standards, reaffirmed the importance of establishing effective, independent, pluralistic national institutions for the promotion and protection of human rights, in conformity with the Principles relating to the status of national institutions. Generally, such institutions have ongoing, advisory authority in respect to human rights at the national and/or international level. These purposes are pursued either in a general way, through opinions and recommendations, or through the consideration and resolution of complaints submitted by individuals or groups. See further OHCHR, *Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights* (April 1993); GA res. 48/134 (1993) on 'Principles relating to the status and functioning of national institutions for protection and promotion of human rights'; and the Commonwealth Secretariat, *Protecting Human Rights: The Role of National Institutions* (August 2000).

expressed support for a greater role for NHRIs with the internally displaced and is planning to convene a seminar to promote this.<sup>89</sup>

For NGOs, the Guiding Principles have come to constitute an important tool for seeking to facilitate improved treatment for internally displaced persons. International and national NGOs have begun to use the Principles as a basis for assessing national and international responses to specific country situations.<sup>90</sup> Amnesty International<sup>91</sup> and Human Rights Watch<sup>92</sup> have begun to systematically apply the Guiding Principles as a basis for monitoring and making recommendations on situations of internal displacement throughout the world. National NGOs have been active in promoting and applying the Guiding Principles in their country context.<sup>93</sup>

To assist in the promotion, dissemination and application of the Guiding Principles at the national level and indicative of their increasing relevance in different parts of the

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<sup>89</sup> E/CN.4/2001/5, at para.32.

<sup>90</sup> See, for instance, Women's Commission for Refugee Women and Children, *A Charade of Concern: The Abandonment of Colombia's Forcibly Displaced* (May 1999); Tamil Centre for Human Rights, 'Internally Displaced People: One Million in the Island of Sri Lanka', press release (20 July 1998); Beaudoin, 'Colombian Nightmare', *On the Record*, Vol.2, No.3 (7 October 1998) 11.

<sup>91</sup> See, for example, the following reports by Amnesty International: *Federal Republic of Yugoslavia. A Human Rights Crisis in Kosovo Province, Document Series B: Tragic Events Continue No.4: The Protection of Kosovo's Displaced and Refugees*, AI Index 70/73/98 (October 1998); *Uganda. Breaking the Circle: Protecting Human Rights in the Northern War Zone*, AFR 59/01/99 (17 March 1999); *East Timor. Seize the Moment*, ASA 21/49/99 (21 June 1999); *Myanmar. Aftermath: Three Years of Dislocation in the Kayah State*, ASA/16/14/99 (June 1999).

<sup>92</sup> See for example, the following Human Rights Watch documents: 'Letter to President Putin Protests Forcible Repatriation of Chechens' (23 December 1999); *Indonesia: Civilians Targeted in Aceh - Human Rights Watch Press Backgrounder* (May 2000); *Burundi: Emptying the Hills: Regroupement Camps in Burundi* (July 2000); and *Turkey: Human Rights and European Union Accession and Partnership* (September 2000).

<sup>93</sup> In the Philippines for example, the Ecumenical Commission for Displaced Families and Communities (ECDFC), as well reproducing the Principles in booklet form in order to facilitate their dissemination, convened a forum discussion on them in December 1998 for representatives of NGOs, relevant Government offices and international agencies to discuss their implementation [See Ecumenical Commission for Displaced Families and Communities (ECDFC) *Monitor*, Vol.13, No.6 (November-December 1998) 12-17]. In Colombia, national NGOs have widely disseminated the Guiding Principles, apply them as a benchmark against which to monitor and evaluate national policies and legislation, and use them to promote and strengthen dialogue with the Government on the rights of internally displaced persons [see Vienna report, note 40 above]. Others, such as NRC are, as noted, engaged in providing training on the Principles in various regions of the world and in Sri Lanka, the non-governmental Consortium of Humanitarian Agencies has produced a 'toolkit' to promote the dissemination and application of the Principles, aimed at Government personnel, non-State actors, international and national NGOs and international agencies. In addition, Save the Children (UK) reference the Guiding Principles as an important contribution to protection in the context of their international campaign on protecting children internally displaced by armed conflict published under the title *War Brought Us Here* (2000).

world, the Principles are being translated into an increasing number of languages, all of which are being posted on the websites of OHCHR and NRC's Global IDP Project to facilitate dissemination.<sup>94</sup>

### **3. Conclusions and Future Steps**

The Guiding Principles have clearly come to constitute an important advocacy tool for international and regional organisations and NGOs in their work on behalf of the displaced. It would seem reasonable to conclude also that an increasing number of governments are finding the Principles to be a useful guide for the development of domestic law and policy on internal displacement. In short, the Principles have been well-received; are being widely used; and increasingly so.

Just as it was the case with their actual development, it is clear that the political support of a number of key States in various United Nations and other fora has been crucial in this process of garnering support for the promotion, dissemination and application of the Principles. Of particular note has been the role of Austria in the Commission on Human Rights who, as the principal sponsor of the annual resolution on internally displaced persons, has been crucial in providing the required language to enable the Representative and others to keep pushing the Principles forward. Indeed, as noted above, after 1998 the Commission resolutions became increasingly stronger and more supportive and, essentially, provided the political endorsement necessary for the continued promotion and dissemination of the Principles. This included accommodating the Representative's views on the most effective ways in which to proceed in these respects, such as the convening of seminars and workshops on internal displacement which have provided and continue to provide an important vehicle for the promotion of the Principles. Equally important have been the efforts of United Nations agencies and national and international NGOs both in terms of basing their advocacy on the Principles and

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<sup>94</sup> Initially available in all United Nations official languages (Arabic, Chinese, English, French, Russian and Spanish) for their presentation to the Commission in 1998, the Principles have since been translated into a number of local languages relevant to particular situations of internal displacement, namely Armenian, Azerbaijani, Georgian, Burmese and Sgaw Karen (Myanmar), Dari and Pashtu (Afghanistan), Portuguese (Angola), and Sinhala and Tamil (Sri Lanka). At the time of writing, their translation into Abkhaz (Georgia), Bahasa Indonesia, Chin (Myanmar), Filipino, Tetum (East Timor) and Turkish language versions was underway. Such efforts to translate and publish the Principles have been undertaken at the initiative of a variety of actors – the United Nations and its agencies, international and local NGOs and Governments, often working in partnership. E/CN.4/2001/5, at para.36.

using them as a benchmark to monitor situations of internal displacement, as well as providing training on them both to their own staff and those of Governments.

And in much the same way as the process of developing the Principles required effort, commitment and resources from a broad range of actors and individuals, so too has the promotion, dissemination and application of the Principles, be it in terms of negotiating with and lobbying States during the sessions of the Commission on Human Rights and the General Assembly; organising and financing regional and country-based seminars and training workshops, including preparing and funding background papers and meeting the accommodation and other expenses of participants; or facilitating and financing translation and publication of the Principles into different languages and so on and so forth.

The fact that a number of States, United Nations agencies and other humanitarian and regional organisations, NGOs, academics and research institutions have been prepared to expend the necessary effort, commitment and resources would seem to indicate that these actors recognise the Principles as a valuable instrument in their efforts to increase protection and assistance for the internally displaced. And indeed, perhaps the bottom line in this respect is quite simply that the Principles fill a gap. As the Representative has remarked, many intergovernmental and non-governmental organisations had noted the need for a document to guide their work with the internally displaced; a document which sets forth in one place the rights of internally displaced persons and the obligations of Governments and insurgent groups towards these populations.<sup>95</sup> The Principles meet that need. Indeed, the value of the Principles is even recognised among their detractors, specifically India which, it will be recalled, acknowledged that the Principles could serve as useful guidelines for States when required.

And what of the future? Efforts continue to find additional ways in which to promote the further implementation of the Principles, thereby contributing to the overall climate of compliance and the seriousness with which States take the Principles. Several initiatives to this end were discussed at an international colloquy on the Guiding Principles, jointly convened by the Representative and the Government of

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<sup>95</sup> Statement of the Representative of the Secretary-General on Internally Displaced Persons at the Seminar on Internal Displacement in Europe, Geneva, 6 September 2001, sponsored by the Committee on Migration, Refugees and Demography, the Office of the Representative of the Secretary-General, the Office of the High Commissioner for Human Rights and the Brookings Institution-CUNY Project on Internal Displacement. Report forthcoming.

Austria in Vienna in September 2000. Attended by representatives from international, regional and sub-regional organizations, national human rights commissions, local and international NGOs, and research and academic institutions, the main objective of the meeting was to explore how best to further promote implementation of the Principles.<sup>96</sup> The outcome of the discussions was the elaboration of a plan of action consisting of several elements in which emphasis was firmly placed on the continued and further integration of the Principles into the work of existing mechanisms and actors, for example, the United Nations country and thematic special rapporteurs, the human rights treaty bodies, international humanitarian and development agencies, the thematic and country specific reports and recommendations of the United Nations Secretary-General, regional and sub-regional organisations and mechanisms such as the Inter-American and European human rights courts. In addition, the colloquy also discussed several new areas in which efforts to promote the Principles could be pursued.

Conscious of the significant developments which have occurred in international criminal law in the last decade, in particular the establishment of the international criminal tribunals for the former Yugoslavia<sup>97</sup> and Rwanda<sup>98</sup> in 1993 and 1994 respectively, and the adoption of the Statute of the International Criminal Court<sup>99</sup> in 1998, consideration was given to integrating the Principles into the work and proceedings of international criminal tribunals. Specifically, it was recommended that the Principles be brought to the attention of international criminal tribunals to highlight the importance of prosecuting forcible population transfers and deportations on ethnic grounds as crimes against humanity, and to help in specifying the elements of the crimes.<sup>100</sup> The prospects for these institutions to make use of the Guiding Principles in their work are also quite positive. As Chinkin observes, the International Criminal Tribunal for the former Yugoslavia has drawn upon a wide variety of non-binding, as well as binding, instruments in its moulding of international criminal law.<sup>101</sup>

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<sup>96</sup> See further, Vienna Report, note 40 above.

<sup>97</sup> Established pursuant to SC res.827 (1993).

<sup>98</sup> Established pursuant to SC res.955 (1994).

<sup>99</sup> *Rome Statute of the International Criminal Court*, A/CONF.183/9 (1998).

<sup>100</sup> *Ibid.*

<sup>101</sup> In the case of *Prosecutor v. Tadic* the Trial Chamber used a range of non-binding materials – the Report of the Secretary-General, the Report of the *ad hoc* committee on the Permanent International Criminal Court, the ILC Draft Articles on Crimes Against the Peace and Security of Mankind – to assist it in defining the elements of offences charged and issues of jurisdiction. According to Chinkin, '[t]his practice shows how those assessing conformity with international standards of behaviour do not always differentiate between hard



Particular emphasis was placed on the importance of encouraging incorporation of the Principles into national policy and legislation, thereby circumventing any concerns as to the nature of their standing at the international level. To this end, NHRIs were encouraged to promote the incorporation of the Principles into domestic law and policy when advising governments on such matters.<sup>102</sup> National NGOs were encouraged to bring displacement-related cases to the attention of national courts, either through public interest litigation, where possible, or by assisting individuals with a view to establishing precedents in the highest national courts.<sup>103</sup> Given the central importance of national courts in implementing international law at the domestic level, either by directly applying relevant norms where this is possible, or in interpreting constitutional guarantees and other relevant national law in the light of international law, it was noted that in either case the Principles can provide guidance in giving specific content to these more general guarantees.<sup>104</sup> The above-mentioned judgements of the Constitutional Court in Colombia reveal the potential for giving binding character in domestic law to the provisions contained in the Principles.

On the same theme, universities and research institutions were considered to have the potential to play an important role in bringing together different actors in a neutral framework to discuss national law and policy and ways to bring them into line with international standards, as restated in the Principles.<sup>105</sup> Finally, it was suggested that regional and international actors such as ODIHR and OHCHR encourage incorporation of the standards contained in the Principles into domestic law when advising governments on, or reviewing, national legislation and policy and in raising awareness of the Principles among national judiciaries. In this connection, it was further suggested that they provide technical assistance to governments to support such efforts.<sup>106</sup>

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and soft obligations, but draw upon all available instruments across the continuum of legality to present as full a picture as possible of appropriate expectations.' Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 36-37.

<sup>102</sup> Vienna Report, note 40 above.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

Emphasis was placed on the importance of empowering internally displaced communities, by acquainting them with and encouraging them to use the Principles to defend their rights and interests. In this regard, NGOs were considered to have a critical role in raising awareness among displaced communities, including through the use of national and local media, and to train and assist them in capacity building.<sup>107</sup>

It was also suggested that the Representative, among others, intensify advocacy efforts for the protection of international and local humanitarian and human rights personnel working with the internally displaced. Given that the Guiding Principles provide for the protection of humanitarian staff,<sup>108</sup> it was noted that such efforts on the part of the Representative would not only support and assist the work of humanitarian agencies, but also serve to reinforce the use and applicability of the Principles and enable greater scope for the protection of the internally displaced on the ground.<sup>109</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Specifically, Principle 26 provides that 'persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence'.

<sup>109</sup> Vienna Report, note 40 above.

## CONCLUSIONS

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Treaties have been, beyond doubt, the principal means for the development of the human rights movement. Indeed, the United Nations has adopted an impressive number of human rights treaties which seek to regulate the behaviour of States in a broad and diverse range of areas. Moreover, in the case of the six core United Nations human rights treaties, there exist supervisory mechanisms at the international level which aim to monitor and assist States in fulfilling their obligations under the relevant treaties. To what extent though do treaties and treaty-making constitute the principal means for the continued and further development of the human rights movement? To what extent does treaty-making constitute an effective and timely response to new and emerging human rights issues? What are the limitations of the treaty-making process? What are the prospects for reform? And in the absence of reform, what are the alternatives? How effective are they? What do we learn from them and to what extent might they be emulated in the future? These are the questions which this thesis has sought to examine through reference to the efforts in recent years to develop a normative framework for the protection of and assistance to internally displaced persons.

To begin with, the adoption of new treaty law standards is not necessarily the principal way in which to proceed with the continued and further development of human rights protection to the extent to which existing human rights standards may be perceived as sufficient. There is, therefore, less of a need for new standards so much as for the effective implementation of existing standards. While the extent of United Nations human rights treaty-making is impressive, and while an emphasis on implementation is necessary and welcome, it should not be at the expense of further standard-setting. The two are not mutually exclusive and nor should they be. Rather, just as implementation of existing standards and the reform or development of new procedures to achieve this are unquestionably important, it is equally important to acknowledge the continuing emergence of new human rights issues requiring international regulation. Needs and concepts change over time and consequently existing instruments may need to be reformed or superseded by new standards reflecting the changing needs of international society. Again though, whether the development of existing or more advanced human rights standards can only effectively be met through treaty-making process is questionable.

To be sure, treaty-making as a form of standard-setting is by no means redundant. It does, however, have its limitations in terms of the need to reach consensus among States and its implications for the negotiation, adoption, ratification and entry into force of a treaty; in terms of structural and procedural weaknesses of the treaty-making as well as, for that matter, other traditional state-centred standard-setting techniques; and finally, in terms of obstacles to the effective implementation of treaties. Such limitations have undermined the utility of treaty-making as a means to advance the protection of human rights and in some cases prompted recourse to alternative, innovative and softer standard-setting techniques, as demonstrated by the development of a normative framework for the internally displaced and the Guiding Principles.

Of course, recourse to non-binding alternatives is not particularly new within the United Nations and indeed, given that the Principles essentially reaffirm and further elaborate previously accepted general norms, they would seem to constitute what Shelton refers to as primary soft law.<sup>1</sup> However, the development of the normative framework and the Guiding Principles possesses certain features which distinguishes it in important respects from other non-binding human rights instruments adopted under the auspices of the United Nations.

To begin with, the Guiding Principles were not developed, as is often the case, as a precursor to the adoption of a treaty on internally displaced persons. True, this option has not been expressly ruled out by the Representative of the Secretary-General and it will be recalled that when he embarked upon developing the normative framework the possibility of developing a treaty was not excluded. Rather, the concern was that the development of such an instrument would take time and could only be conceived in a long-term perspective. Subsequently, the Representative benefited from the experience of the draft declaration on fundamental standards of humanity, from which he drew the conclusion that the drafting of a treaty or even a non-binding instrument but through a formal intergovernmental process was not the way to proceed.

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<sup>1</sup> See Shelton, 'Commentary and Conclusions', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 450 and the discussion of this in part three of Chapter 3.

Rather than being a pre-cursor to the adoption of a treaty, the Principles represent, on the contrary, an appreciation of and reaction to the weaknesses and problems of treaty-making. It was in view of the incompatibility between the urgency of developing a normative framework for the internally displaced and the pitfalls inherent in the treaty-making process that the Representative sought to consolidate the relevant norms of international law and address the gaps and grey areas therein through a non-binding restatement of those norms in the form of the Guiding Principles.

In addition to allowing the Representative to respond to the urgency of the situation – the Principles were developed over a relatively short period of four years – this approach allowed him to take advantage of a number of opportunities which were indispensable to the process and which would otherwise have been unavailable. In particular the Representative was able to secure the participation in different respects of a very broad range of non-governmental or non-state actors. As noted in Chapter 3, one of the reasons explaining the emergence of soft law over hard law is that the former allows for more active participation of non-state actors, permitting them to play a role which is possible only rarely in traditional law-making processes.<sup>2</sup> In the case of the Guiding Principles, however, the key point is not that non-governmental actors were able to play a greater role in the process than may have been possible in the traditional law-making context but that they played an indispensable role, both in the development of the Principles, in terms of providing

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<sup>2</sup> Shelton, 'Law, Non-Law and the Problem of "Soft Law"', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 13. That said, it should be noted that some have pointed to the often major disparity between the formal or *de jure* role permitted to NGOs in human rights standard-setting and the *de facto* role they actually play, the latter of which is said to have evolved considerably over the years. See Alston, 'The Commission on Human Rights', in P. Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 203. Although the inclusion of human rights provisions in the United Nations Charter was largely due to NGOs, which were also instrumental in the drafting of the Universal Declaration of Human Rights, as Chinkin observes, NGOs have come to play a much greater role in human rights standard-setting: NGO membership typically comprises expertise and personal commitment that is not always present in government representatives. NGOs can influence treaty negotiation and drafting indirectly through providing information to, preparing draft texts and educating and lobbying governments and individual government officials to persuade them to take up issues in the formal drafting sessions. They can also participate directly through active participation in negotiation and drafting.' Chinkin, 'The Role of Non-Governmental Organisations in Standard-Setting, Monitoring and Implementation of Human Rights', in J.J. Norton *et al*, *The Changing World of International Law in the Twenty-First Century* (1998) 51-52. The important role that NGOs can play in standard-setting was particularly pronounced during the drafting of the Convention on the Rights of the Child. See for example, Cantwell, 'Non-Governmental Organisations and the United Nations Convention on the Rights of the Child', in United Nations, *Bulletin of Human Rights 91/2: The Rights of the Child* (1992) 18; and

expertise and financial resources and garnering political support, but equally in the subsequent efforts to promote the application of the Principles. As a result of such efforts, irrespective of their lack of formal binding force the Guiding Principles are coming to provide the framework within which international and, to a lesser (but nonetheless increasing) extent, national protection and assistance activities on behalf of the internally displaced are conducted.

The Guiding Principles might also be considered to differ from other non-binding instruments adopted under the auspices of the United Nations to the extent to which the role of States in their development was essentially that of consenting to the various stages in the process. There was no formal and broad intergovernmental negotiation of the content of the Principles as would have been the case in the development of a declaration for adoption by the Commission on Human Rights or the General Assembly. Avoiding such negotiations, in view of their likely time-consuming nature, was a significant motivation for the approach followed. In this connection though, it should be noted that the need for State involvement in the process beyond that of giving consent to the various stages was not necessarily required given that the Principles were not an exercise in law-making in the sense of creating new law through negotiation but in restating existing general norms in the specific context of internal displacement – an exercise in making the implicit explicit. That the Principles constituted an exercise in restatement would in part explain the broad support for the process from among States in the Commission on Human Rights and the General Assembly – the relevant resolutions of these bodies were all adopted by consensus.

To compare the Guiding Principles to 'other non-binding instruments adopted under the auspices of the United Nations' is not strictly accurate in the sense that, as some States have been at pains to point out, the Guiding Principles have not been formally submitted to or adopted by an intergovernmental process, such as through a resolution of the Commission on Human Rights or the General Assembly. While the Principles lack the express imprimatur of these bodies, there is a case to be made for their having been informally or implicitly adopted in the sense that the various stages in their development has depended on the consent, passive or otherwise, of States as expressed in the Commission and the General Assembly. Similarly, the subsequent use of the Principles by the Representative and

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Cohen, 'The Role of Non-Governmental Organisations in the Drafting of the Convention on the Rights of the Child', 12 *HRQ* (1990) 142-3.

intergovernmental and non-governmental actors has been sanctioned (and consistently so) by States through the resolutions of these same bodies. Their lack of formal intergovernmental approval notwithstanding, it is interesting to note that the Principles are increasingly referred to, both by Governments and non-governmental actors alike, as the 'United Nations' Guiding Principles on Internal Displacement, contributing to a sense of ownership through association on the part of the United Nations Organisation.

What then do we learn from the experience of developing the normative framework for the internally displaced? And to what extent does it constitute a model for future human rights law-making initiatives? With regard to the first question, two points of broader application can be identified. First, the elaboration of a treaty, giving rise to binding obligations for those States which sign and ratify it, is not necessarily a prerequisite for providing an effective normative framework if the instrument in question can be successfully implemented in practice. That is to say, that implementation is more important than the theoretical binding force of an instrument. As Simma has observed, soft law instruments, 'if they are equipped with an efficient follow-up mechanism, can be equally, or even more troublesome or threatening to States than treaty obligations linked to supervision by ... more detached expert bodies.'<sup>3</sup>

Of course, it may be argued, as Shelton does, that in the long run, 'non-binding norms in human rights are generally not as effective as binding commitments and the enforcement possibilities that come with them for victims and their representatives', such as litigation.<sup>4</sup> While it is true that absent their incorporation into the domestic law of a given State, the Guiding Principles could not as a rule be invoked in the national courts of that State, they could nonetheless be referred to in litigation to contextualise and support the interpretation of those provisions of international or national law which may be invoked, as indeed has become the practice of the Colombian Constitutional Court.

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<sup>3</sup> Simma, 'International Human Rights and General International Law: A Comparative Analysis', IV-2 AEL (1995) 234. See also Shelton, note 1 above, at 462: 'Whether the norms are binding or non-binding, compliance seems most directly linked to the existence of effective monitoring and independent supervision'. Shelton adds, that the role of NGOs in this regard, 'has been crucial'. Ibid.

<sup>4</sup> Shelton, *ibid.*, at 463.

The second point of broader application to arise from the example of the Guiding Principles is that a consistent measure of observance, reflected by the extent to which States use and acquiesce in the use of the instrument by United Nations and other actors, will serve to increase its authority and lead to a gradual 'hardening' of the principles contained therein. As Szasz observes, 'soft law often does not remain "soft". Frequently it becomes the precursor to hard law, either because states complying with it eventually create customary law or because soft law may be part of the raw material taken into account when codifying or developing norms into treaty law'.<sup>5</sup>

As indicated above, the possibilities that the Principles become a hard law instrument in the future has not been expressly ruled out. As to their acquiring the status of customary international law, again only time will tell though this is more problematic than their transformation into hard law in the form of a treaty.<sup>6</sup> Whereas the latter would constitute a deliberate and express decision on the part of States parties to the treaty to change the binding force of the Principles, judging whether the Principles have acquired the status of customary law is an exercise fraught with difficulty and uncertainty, depending as it does on sufficient evidence of State practice and *opinio juris*.<sup>7</sup>

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<sup>5</sup> Szasz, 'General Law-Making Processes', in O. Schachter and C. Joyner (ed), United Nations Legal Order (1995) 47. See also Gold, 'Strengthening the Soft International Law of Exchange Agreements', 77 *AJIL* (1983) 444: 'The usefulness of soft law as a contribution to the growth of international law is that the application of soft law can produce over time an accretion of firm law'.

<sup>6</sup> Interestingly, the potential for a non-binding instrument to acquire customary law status is expressly recognised in the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, which were adopted by the General Assembly in 1993. In an introductory section the Rules state that '[a]lthough the Rules are not compulsory, they can become international customary rules when they are applied by a great number of States with the intention of respecting a rule of international law' (para.14). See *Standard Minimum Rules for the Equalisation of Opportunities for Persons with Disabilities*, GA res.48/96 (1993). See further, Darrow, 'International Human Rights Law and Disability: Time for an International Convention on the Human Rights of Persons with Disabilities?', 3 *Australian J. Human Rights* (1996) 69; and Doyle, 'Disabled Workers' Rights, the Disability Discrimination Act and the UN Standard Rules', 25 *ILJ* (1996) 13.

<sup>7</sup> As Brownlie observes: 'The elements of the formation of the rules of general international law – international custom – are not some esoteric invention but rather they provide criteria by which the actual expectations and commitments of States can be tested'. On this basis, Chinkin observes that 'State practice is evidenced by what States do, as well as by what they say. Before a decision-maker accepts such a claim, evidence should be produced that an instrument of soft law has been consistently acted upon.. Even where there is evidence of a consistent and uniform body of State practice, there is need to establish *opinio juris* and the conceptual problem as to whether action taken in compliance with an instrument specifically denied to be legally binding and asserted to be voluntary can be evidence of *opinio juris*.' See Brownlie, 'The Rights of Peoples in Modern International Law', in J. Crawford (ed), *The Rights of Peoples* (1988), cited in Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 857. On the need for



While not discounting the possibility that the Principles may over time acquire the status of customary international law, in the meantime it is more useful to focus on their potential for gaining binding force at the national level. As Shelton observes, the use of soft law 'begins a dynamic process over time that may lead to hard law or the norm may remain soft at the international level but become hard law internally.'<sup>8</sup> In this connection, the use of the Principles by the Governments of Angola and Burundi and their incorporation into domestic law and policy, as well as the recent judgements of the Colombian Constitutional Court are all encouraging examples of the potential for the Principles to become hard law at the national level while remaining soft at the international level.<sup>9</sup>

Overall therefore, treaty-making is not always the optimum means through which the international community can seek to effectively respond to new and pressing human rights concerns. Rather, it may be possible to resort to innovative and more nuanced standard-setting techniques which can result in the elaboration of instruments which may be broader in scope and more progressive in content and, if reinforced by the suitable measures and means for their promotion, dissemination and implementation, more effective than treaties in regulating the activities of States in the areas which they address.

To what extent though does the development of the normative framework for the internally displaced represent a model for human rights law-making in the future? It is certainly the case that the development of the normative framework and the Principles has set an example of increasing interest to others. As testament to the apparent success of the Principles, some proponents of a declaration on fundamental standards of humanity have suggested that that process follow a similar course to that set by the Representative and the Principles.<sup>10</sup> Similarly, OHCHR is looking to the example of the Principles, not so much for the further

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sufficient evidence of material state practice see Chapter 3 above and references to Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of Int'l. L.* (1992) 87.

<sup>8</sup> Shelton, note 2 above, at 17.

<sup>9</sup> Moreover, it will be recalled that this was in essence a major thrust of the future steps for promoting the implementation of the Principles to arise from the Vienna Colloquy. See part three of Chapter 4.

<sup>10</sup> Such views came to the fore at an 'expert meeting on fundamental standards of humanity', convened in Stockholm in February 2000. The meeting report is available as an annex to Letter dated 30 March 2000 from the head of delegation of Sweden to the fifty-sixth session

development of international standards on HIV/AIDS but to identify effective ways of disseminating and promoting the Guidelines on HIV/AIDS and Human Rights as adopted by the Second International Consultation on HIV/AIDS and Human Rights in 1996.<sup>11</sup>

On reflection though it is apparent that the development of the normative framework is not a model for future human rights standard-setting in the United Nations to the extent to which there were certain and in some respects unique factors which made the development of the Principles possible and which will not always be present in regard to other standard-setting initiatives. First, there was the ability of the Representative to mobilise the support of a broad range of Governmental, non-governmental and intergovernmental actors and, in turn, their preparedness to support his efforts in several, often quite diverse, but ultimately crucial ways.

Second, the mandate given to the Representative by the Commission on Human Rights and, in later stages, the General Assembly, specifically requested him to develop 'an appropriate normative framework' for the protection of the internally displaced. The difficulties of obtaining such a mandate should not be underestimated as the attempts to elaborate a body of fundamental standards of humanity demonstrate. No mandate has been created by the Commission which includes responsibility for standard-setting in this area. On the contrary, whereas the Sub-Commission submitted the draft declaration of minimum humanitarian standards to the Commission in 1994 'with a view to its further elaboration and eventual adoption',<sup>12</sup> the Commission's subsequent approach to this issue has gradually moved away from the elaboration of specific standards towards a seemingly endless series of requests for studies on the issue.<sup>13</sup>

Third, the Representative was mandated to develop an appropriate 'normative' framework, as opposed to a 'legal' framework. Thus, he was not expressly requested to develop new legal standards which could have led in the direction of a treaty or declaration or similar non-binding instrument to be adopted by States and

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*of the Commission on Human Rights addressed to the Chairman of the Commission on Human Rights, E/CN.4/2000/145 (2000).*

<sup>11</sup> Contained in Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996) Report of the Secretary-General. E/CN.4/1997/37 (1997).

<sup>12</sup> See CHR res.1995/29.

<sup>13</sup> At its fifty-seventh session in 2001, the Commission adopted decision 2001/112 in which it requested the Secretary-General, in consultation with the International Committee of the Red

which would necessarily have required far greater State involvement in the process. Such a course might have been pursued within the bounds of developing a 'normative' framework if deemed appropriate by the Representative but it was not specifically requested by the Commission or the General Assembly.

While the development of the Principles may not herald the future of human rights law-making, looking to the broader international context, the case of the Guiding Principles is indicative, however, of a gradual but nonetheless fundamental change in the overall processes of international law-making in the age of globalisation and the diversification of authority among a broad range of actors. That is to say, an age in which traditional forms of international law-making through treaties and custom are less appropriate to shape the relationships between the various actors that are an integral part of globalisation, reflecting the changing roles of States, the private sector, and civil society organisations such as NGOs in the emerging global system.<sup>14</sup> As the United Nations Secretary-General, Kofi Annan, remarked to the General Assembly in September 2000:

If the twentieth century has taught us anything, it is that large-scale, centralised government does not work. It does not work at the national level, and it is even less likely to work at the global level.

Governments can bring about change, not by acting alone but by working together with other actors – with commercial enterprises, and with civil society in the broadest sense.<sup>15</sup>

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Cross, to submit a 'further' report on the question of fundamental standards of humanity to the Commission at its fifty-eighth session, 'covering relevant developments'.

<sup>14</sup> See further, W. Reinicke and J.M. Witte, 'Interdependence, Globalisation and Sovereignty: The Role of Non-Binding Legal Accords', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 75.

<sup>15</sup> 'As general debate begins, Secretary-General tells Member States: "Key decisions lie in your hands"', Press Release SG/SM/7544/Rev.1 (14 September 2000), available at [www.un.org](http://www.un.org)



## **GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT\***

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### **INTRODUCTION: SCOPE AND PURPOSE**

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.

2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:

(a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;

(b) States when faced with the phenomenon of internal displacement;

(c) All other authorities, groups and persons in their relations with internally displaced persons; and

(d) Intergovernmental and non-governmental organizations when addressing internal displacement.

4. These Guiding Principles should be disseminated and applied as widely as possible.

### **SECTION I - GENERAL PRINCIPLES**

#### **Principle 1**

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.

2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

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\* As contained in *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Addendum. Guiding Principles on Internal Displacement*. E/CN.4/1998/53/Add.2 (1998).

## Principle 2

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.

2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

## Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.

2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

## Principle 4

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.

2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

## SECTION II - PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT

### Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

### Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

2. The prohibition of arbitrary displacement includes displacement:

(a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;

(b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;

(c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and

(e) When it is used as a collective punishment.

3. Displacement shall last no longer than required by the circumstances.

#### Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:

(a) A specific decision shall be taken by a State authority empowered by law to order such measures;

(b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;

(c) The free and informed consent of those to be displaced shall be sought;

(d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;

(e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and

(f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

#### Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

## Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

### SECTION III - PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT

## Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:

(a) Genocide;

(b) Murder;

(c) Summary or arbitrary executions; and

(d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

(a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;

(b) Starvation as a method of combat;

(c) Their use to shield military objectives from attack or to shield, favour or impede military operations;

(d) Attacks against their camps or settlements; and

(e) The use of anti-personnel landmines.

## Principle 11

1. Every human being has the right to dignity and physical, mental and moral integrity.

2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:

(a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;



(b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and

(c) Acts of violence intended to spread terror among internally displaced persons.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

#### Principle 12

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.

3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.

4. In no case shall internally displaced persons be taken hostage.

#### Principle 13

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.

2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

#### Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.

2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

#### Principle 15

Internally displaced persons have:

(a) The right to seek safety in another part of the country;

(b) The right to leave their country;

(c) The right to seek asylum in another country; and

(d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

### Principle 16

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
3. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

### Principle 17

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

### Principle 18

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
  - (a) Essential food and potable water;
  - (b) Basic shelter and housing;
  - (c) Appropriate clothing; and
  - (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

### Principle 19

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

### Principle 20

1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

### Principle 21

1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
  - (a) Pillage;
  - (b) Direct or indiscriminate attacks or other acts of violence;
  - (c) Being used to shield military operations or objectives;
  - (d) Being made the object of reprisal; and
  - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

## Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:

- (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
- (b) The right to seek freely opportunities for employment and to participate in economic activities;
- (c) The right to associate freely and participate equally in community affairs;
- (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
- (e) The right to communicate in a language they understand.

## Principle 23

- 1. Every human being has the right to education.
- 2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
- 3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
- 4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

## SECTION IV - PRINCIPLES RELATING TO HUMANITARIAN ASSISTANCE

### Principle 24

- 1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
- 2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

### Principle 25

- 1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
- 2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily

withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

#### Principle 26

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

#### Principle 27

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.

2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

### **SECTION V - PRINCIPLES RELATING TO RETURN, RESETTLEMENT AND REINTEGRATION**

#### Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

#### Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

### Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

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